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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CMC HEARTLAND PARTNERS,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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July 2, 1996

QUESTION PRESENTED

This case presents an important and recurring question of federal bankruptcy law on which the circuits are sharply divided: does a federal bankruptcy "claim" based on state law arise at the time when the conduct underlying the claim occurs, or at the time when state law creates a cause of action imposing liability for that conduct?

PARTIES TO THE PROCEEDING

Petitioner, CMC Heartland Partners, was appellant below. Respondent, Union Pacific Railroad Company, was appellee below.

Pursuant to this Court's Rule 29.6, petitioner notes that it is a Delaware general partnership with two general partners: (1) Heartland Partners, L.P., which owns 99.99% of the partnership, and (2) Milwaukee Land Company, which owns .01% of the partnership. Heartland Partners, L.P. is a publicly-held Delaware limited partnership, whose general partner is Milwaukee Land Company. Milwaukee Land Company is a publicly-held Delaware corporation.

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Steven E. Sherman, *Environmental Issues Facing High-Tech Companies In Chapter 11 Proceedings*, in *Computer Law* (Sept. 1994) 14

CMC Heartland Partners respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The two opinions of the Court of Appeals for the Seventh Circuit are reported at 78 F.3d 285 (1996), and 3 F.3d 200 (1993), and are reprinted at Appendix ("App.") 1a-18a and 19a-34a respectively.

The District Court's unreported order consummating the Milwaukee Road bankruptcy is reprinted at App. 65a-74a. The District Court's first order upholding respondent's post-discharge state-law claim against petitioner is reported at 1992 WL 316321, and reprinted at App. 37a-46a. The District Court's second order upholding that claim is reported at 1994 WL 722053, and reprinted at App. 47a-64a.

JURISDICTION

The most recent judgment of the Court of Appeals was entered on February 28, 1996. CMC Heartland Partners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on April 3, 1996. App. 35a-36a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The Bankruptcy Act of 1898 defined a "claim" as, *inter alia*, "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." 11 U.S.C. § 205(b) (repealed 1978).

The Bankruptcy Code of 1978 defines a "claim" as, *inter alia*, a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5).

STATEMENT OF THE CASE

This case involves a dispute over liability for an environmental clean-up of a former railyard located in Tacoma, Washington. The property was owned from the early years of this century by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee Road"). App. at 24a. Like many other railroads, the Milwaukee Road fell into financial straits in the 1960s and 70s. The company filed a petition for bankruptcy reorganization on December 19, 1977, in the United States District Court for the Northern District of Illinois. *Id.* at 23a.

A. Union Pacific Purchases the Tacoma Railyard

As part of the reorganization process, the bankruptcy trustee placed the Milwaukee Road's Tacoma railyard on the market. On March 28, 1980, respondent Union Pacific Railroad Company agreed to purchase the property. The purchase agreement included a clause by which the bankruptcy trustee and the Milwaukee Road agreed to indemnify Union Pacific and its subsidiaries "against any and all claims, damages, liabilities, losses or demands whatsoever, and expenses in connection therewith, including reasonable fees of outside counsel, regardless of the source or nature thereof, arising out of the operation of the Properties prior to March 12, 1980." App. at 23a. The bankruptcy court authorized the purchase, and the trustee conveyed the property by quitclaim deed on December 19, 1980. *Id.* at 24a.

Union Pacific was under no illusion that the Tacoma railyard was in a pristine state. To the contrary, Union Pacific engineers who inspected the property in April 1980 observed (among other things): "[The d]iesel fueling area is oil saturated and will probably require removal of surface oil as well as contaminated dirt. Apparently, this covers quite a large area and may require extensive clean-up." *Id.* at 25a. Thus, it came as no surprise when the United States Environmental Protection Agency ("EPA") in October 1981 designated the entire Commencement Bay and the Nearshore Tideflats area (including the Tacoma

railyard) as a federal Superfund site. *See id.*.[1] Finally, in January 1982, an environmental study commissioned by the Washington State Department of Ecology concluded (among other things) that many hazardous materials had been spilled at the railyard and that accordingly "the soils at this site are possibly permeated with toxic compounds." *Id.* at 26a.[2]

B. The Bankruptcy Reorganization Is Completed

By 1985, the District Court was winding up the Milwaukee Road bankruptcy reorganization. On July 12, 1985, the Court confirmed a comprehensive reorganization plan. The plan required all post-petition claims (*i.e.*, claims against the Milwaukee Road arising *after* the bankruptcy petition was filed) to be filed on or before the "claims bar date" of September 10, 1985. After that date, all further post-petition claims against the bankruptcy trustee, the Milwaukee Road, and the latter's successors and assigns would be barred in perpetuity unless "based on *facts* that are unknown, undisclosed and unasserted" as of that date. App. at 24a (emphasis added).

Union Pacific actively participated in the Milwaukee Road bankruptcy proceedings, filing several claims against the bankruptcy estate and negotiating with the trustee. App. at 24a, 38a. Accordingly, Union Pacific and its legal counsel were on the official service list for the reorganization, and received notice of the claims bar dates, notice of the hearings regarding the reorganization plan, and a copy of that plan. However, notwithstanding the manifest environmental contamination at the Tacoma railyard, *Union Pacific filed no*

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[1] Indeed, the EPA characterized the Tacoma site as one of the ten most hazardous in the country—a characterization widely reported in the local and national media. *See id.* at 25a.

[2] Although Union Pacific officials later denied any knowledge of this study, the District Court specifically found that "this information was available had they sought it out." App. at 43a.

claims against the bankruptcy estate relating to any such contamination.

On November 12, 1985, the District Court entered an order consummating the bankruptcy and discharging all further claims against the bankruptcy trustee, the Milwaukee Road, and the latter's successors and assigns. *See* App. at 70a. The order also enjoined all persons from asserting claims that had been discharged. *See id.* at 73a-74a. The Court expressly retained jurisdiction to enforce that injunction. *See id.* at 71a.

C. The First Round of Litigation

In April 1989, the EPA notified Union Pacific that it was potentially liable for environmental cleanup costs at the Tacoma railyard under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"). App. at 27a. In October 1990, the Washington State Department of Ecology notified Union Pacific that it was also potentially liable for such costs under a state-law analogue to CERCLA, the Washington State Model Toxics Control Act, Wash. Rev. Code §§ 70.105D *et seq.* ("MTCA"), which had been enacted the previous year. *See id.*

On September 9, 1991—nearly two and a half years after receiving the EPA notification—Union Pacific served upon petitioner CMC Heartland Partners ("CMC"), successor in interest to the Milwaukee Road, a letter demanding settlement negotiations regarding liability for the clean-up costs at the Tacoma railyard. Notwithstanding the Milwaukee Road's 1985 bankruptcy discharge, Union Pacific asserted that CMC was liable for environmental clean-up costs at the Tacoma railyard under both CERCLA and the MTCA.

On November 13, 1991, CMC invoked the District Court's retained jurisdiction over the Milwaukee Road bankruptcy by filing a motion to enjoin Union Pacific's claims. Those claims, CMC noted, could and should have been asserted during the

bankruptcy proceeding.[3] The District Court agreed with CMC with respect to the federal CERCLA claims, but disagreed with respect to the state-law MTCA claims. *See* App. at 37a-46a. The Court first held that Union Pacific had at least constructive knowledge of its CERCLA claims before the bar date, and thus was barred thereafter from asserting those claims against CMC. *See id.* at 43a-44a. But the Court then held that Union Pacific had no similar knowledge with respect to its MTCA claims, because the MTCA was not enacted until 1989, four years *after* the claims bar date. *See id.* at 44a-45a.

The Seventh Circuit affirmed in part, vacated in part, and remanded. *See* App. at 19a -34a. The Court first affirmed the District Court's conclusion that Union Pacific's CERCLA claims were barred because Union Pacific had at least constructive knowledge of those claims before the bar date but had not filed a contingent claim against the bankruptcy estate. *See id.* at 28a-33a.[4]

The Seventh Circuit then vacated the District Court's conclusion that Union Pacific's claims under the Washington MTCA were not barred because the statute was not enacted until after the claims bar date. *See id.* at 33a-34a. The relevant inquiry, the Seventh Circuit asserted, was not when the statute was enacted, but whether the type of liability it imposed "existed under predecessor statutes prior to the bar dates, and whether Union Pacific consequently had a contingent claim for environmental cleanup costs under Washington statutes in effect before the bar dates." *Id.* at 34a. Accordingly, the Seventh Circuit remanded for the District Court to determine "what liabilities under the [MTCA] existed [at the time of

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[3] Union Pacific subsequently filed a lawsuit in the district court for the Western District of Washington, seeking a declaratory judgment and contribution and asserting claims under the MTCA and CERCLA. *See* App. at 27a-28a. That action has been stayed pending resolution of this case.

[4] Indeed, the Seventh Circuit noted that "on the basis of the record before it, the [District] [C]ourt could have found actual knowledge as well" as constructive knowledge of the potential CERCLA claims. App. at 31a.

discharge] by virtue of Washington state statutes then in effect." *Id.*

D. The Second Round of Litigation

On remand, the District Court assigned the case to a magistrate judge, who compared the MTCA to three Washington statutes that had existed prior to the bar date: (1) the Water Pollution Control Act, Wash. Rev. Code § 90.48 (1985), (2) the Hazardous Waste Management Act, Wash. Rev. Code § 70.105 (1985), and (3) the nuisance statute, Wash. Rev. Code § 7.48 (1985). The magistrate judge concluded that none of these statutes imposed the same liability as that created by the MTCA. The District Court considered the parties' objections to the magistrate judge's recommended order and, after minor modifications, ratified that order. *See* App. at 47a-64a.

The Seventh Circuit affirmed, holding that the District Court had properly concluded that the liability created by the MTCA was a "new" liability distinct from any liability that existed under Washington law at the time of the bar date in 1985. *See* App. at 9a-17a.[5]

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[5] The Seventh Circuit also noted that, while this litigation was pending, Union Pacific sold the railyard to the Port of Tacoma. Union Pacific sought to substitute the Port as the party prosecuting the case, but the Court of Appeals refused to allow the substitution. *See* App. at 4a.

REASON FOR GRANTING THE WRIT

THE CIRCUITS ARE DIVIDED AS TO THE POINT IN TIME AT WHICH A FEDERAL BANKRUPTCY "CLAIM" BASED ON STATE LAW ARISES.

A. The Federal Bankruptcy Laws Broadly Define "Claims"

As Judge Aldisert noted below, this case presents "the important question" that arises "here and in other judicial circuits" of "whether debtors in bankruptcy who are charged with pollution in the past can be held liable for cleanup costs of hazardous waste at their former business sites." App. at 20a. Resolution of that question implicates the most fundamental principles underlying the federal bankruptcy laws.

Those laws serve two core purposes: (1) to ensure an equitable settlement of debts among a bankrupt's creditors, and (2) thereafter to give the bankrupt a "fresh start" freed from those debts. *See, e.g., Kokoszka v. Belford*, 417 U.S. 642, 645-46 (1974); *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918); *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915). The bankruptcy laws seek to achieve both these purposes by providing for a comprehensive settlement of the bankrupt's debts followed by a binding discharge of those debts. In order for this procedure to succeed, it is imperative that all debts be settled during the bankruptcy proceeding. Permitting creditors to pursue collection of those debts *after* that proceeding would not only undermine the fairness of the distribution but also jeopardize the bankrupt's ability to make a "fresh start."

Accordingly, the bankruptcy laws require creditors to present all "claims" against a bankrupt during the bankruptcy proceeding or lose those claims forever. *See* 11 U.S.C. §§ 727(b), 1141(d); *see also* former 11 U.S.C. § 35 (repealed 1978). In addition, the bankruptcy laws broadly define the term "claim" to ensure that all conceivable liabilities are presented for orderly resolution during a pending bankruptcy

proceeding. *See, e.g., Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985). A "claim" includes all potential debts, no matter how remote or contingent. *See, e.g., In re Cybermech, Inc.*, 13 F.3d 818, 821 (4th Cir. 1994); *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22, 22-27 (2d Cir. 1939), *cert. denied*, 308 U.S. 622 (1940).[6] Indeed, the breadth of that term can hardly be overstated. The courts have described it not only as "broad" and "very broad," but as "extremely broad," "could not be broader," "broadest possible," "all-encompassing," and "sufficiently broad to cover any possible obligation." *In re Waterman S.S. Corp.*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992) (internal citations and quotations omitted) (collecting definitions).

B. A Federal Bankruptcy "Claim" Arises at the Time the Relevant Conduct Occurs, Not at the Time State Law Creates Liability Based On Such Conduct.

The acknowledged breadth of the statutory term "claim" informs, but does not directly answer, the question at issue here: *when* does a state-law "claim" arise for purposes of the federal bankruptcy laws? To the extent that Union Pacific's claims against CMC arose *before* the Milwaukee Road's bankruptcy discharge, those claims are barred.

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[6] Because the Milwaukee Road filed for bankruptcy before the enactment of the current Bankruptcy Code in 1978, this case is governed by the Bankruptcy Act of 1898. Both statutes broadly define the term "claim" to include wholly contingent obligations of the sort at issue here. The Seventh Circuit's resolution of this case, accordingly, in no way turned on any perceived distinction between the 1898 and 1978 bankruptcy statutes. *See In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 781 (7th Cir. 1992) ("Just as Section 77 of the 1898 Act broadly defines claims, the new Bankruptcy Code also broadly defines claims. Compare 11 U.S.C. § 205(b) (repealed 1978) and 11 U.S.C. § 101(4)(A) and (B) (enacted 1978).").

To determine the point in time at which Union Pacific's claim under the Washington MTCA arose, the Seventh Circuit focused on the point in time at which state law created the relevant legal liability. While rejecting the mechanical suggestion that, for purposes of federal bankruptcy law, a "claim" under the MTCA could not arise before the enactment of that statute, *see* App. at 34a, the Court focused the inquiry on the existence of *other* state statutes that imposed the *same* liability, *see id.* Therefore, in the first round of this litigation, the Seventh Circuit remanded the case for the District Court to determine "what liabilities under the [MTCA] existed [at the time of discharge] by virtue of Washington state statutes then in effect." *Id.* The District Court subsequently concluded that no other state statute had imposed that same liability, *see id.* at 56a-64a, and the Seventh Circuit affirmed that conclusion, *see id.* at 9a-17a. Because Union Pacific's MTCA claim did not arise until the enactment of that statute in 1989, the Seventh Circuit held, it could not have been discharged during the 1985 bankruptcy proceeding. *See id.* at 3a, 7a, 9a-10a, 17a.

The Seventh Circuit violated federal law and policy by looking to state law to determine when a "claim" arose for federal bankruptcy purposes. The Seventh Circuit's underlying premise—that a "claim" based on state law cannot arise until state law officially creates the specific liability on which the claim is based—is incorrect. The question of when a federal bankruptcy "claim" arises is a *federal* question to be resolved by reference to the text, structure, and purposes of the federal bankruptcy laws. As at least three other circuits have held, the determination of when a "claim" arises cannot be left to turn on the vagaries of state law. *See, e.g., In re Piper Aircraft Corp.*, 58 F.3d 1573, 1576 & n.2 (11th Cir. 1995); *In re Jensen*, 995 F.2d 925, 929-30 & n.5 (9th Cir. 1993); *Grady v. A.H. Robins Co.*, 839 F.2d 198, 201-02 (4th Cir.), *cert. dismissed*, 487 U.S.

1260 (1988).[7] These circuits, unlike the Seventh Circuit, accordingly recognize that "a claim can exist even though the holder of that claim may have no present cause of action against the debtor" under state law. Arlene E. Mirsky *et al.*, *The Interface Between Bankruptcy and Environmental Laws*, 46 Bus. Law. 623, 652 (1991).

Thus, in determining when a "claim" arises for purposes of the federal bankruptcy laws, "[m]ost courts have focused on the time when the *conduct giving rise to the claim* occurred . . . . With respect to claims under state and federal environmental laws, this usually means the *time at which the contamination or violation occurred.*" *Id.* at 651-52 (emphasis added). The relevant inquiry, in other words, focuses on the underlying conduct at issue rather than the legal consequences or label a state attaches to that conduct. Because "[c]laims in bankruptcy arise from the debtor's conduct," *In re Zelis*, 66 F.3d 205, 209 (9th Cir. 1995) (citing *In re Jensen*, 127 B.R. 27, 32-33 (9th Cir. BAP 1991)), "[a] 'claim' arises at the moment when acts giving rise to the alleged liability are performed." *In re Waterman S.S. Corp.*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992) (internal quotation marks added).[8] *See also In re Johns-*

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[7] Many district courts sitting in bankruptcy have also held that "for federal bankruptcy purposes, a prepetition 'claim' may well encompass a cause of action that, under state law, was not cognizable until after the bankruptcy petition was filed." *In re Johns-Manville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986); *see also In re Food Barn Stores, Inc.*, 175 B.R. 723, 728-31 (Bankr. W.D. Mo. 1994); *In re Waterman S.S. Corp.*, 141 B.R. 552, 556 (Bankr. S.D.N.Y. 1992); *In re Black*, 70 B.R. 645, 647-51 (Bankr. D. Utah 1986); *Acevedo v. Van Dorn Plastic Mach. Co.*, 68 B.R. 495, 497-98 (Bankr. E.D.N.Y. 1986); *In re Edge*, 60 B.R. 690, 704-05 (Bankr. M.D. Tenn. 1986); *In re Yanks*, 49 B.R. 56, 57-59 (Bankr. S.D. Fla. 1985); *In re Baldwin-United Corp.*, 48 B.R. 901, 904 (Bankr. S.D. Ohio 1985).

[8] This focus on the underlying conduct is also reflected in the bankruptcy reorganization plan in this case, which barred all post-discharge contribution or indemnity claims "based on *facts* that are unknown, undisclosed and unasserted" as of the bar date. App. at 24a (quoting Plan of Reorganization § 11.2) (emphasis added).

Manville Corp., 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986); *In re Transp. Sys. Int'l, Inc.*, 110 B.R. 888, 894 (D. Minn. 1990), *aff'd*, 930 F.2d 625 (8th Cir. 1991); *In re Grynberg*, 143 B.R. 574, 576 (Bankr. D. Colo. 1990), *aff'd*, 966 F.2d 570 (10th Cir. 1992). The point at which state law recognizes a cause of action imposing liability for that conduct is immaterial.[9]

That approach is consistent with the broad federal bankruptcy definition of "claim." By holding that a "claim" cannot arise until state law creates the specific liability on which it is based, the Seventh Circuit has opened the door for state law to create "new" post-discharge liabilities based on pre-discharge conduct. The power to impose such liabilities, of course, is the power to undermine the "Uniform Laws on the subject of Bankruptcies throughout the United States" that Congress has enacted pursuant to its express constitutional power. *See* U.S. Const. Art. I, § 2, cl. 4. *Cf. New York v. Feiring*, 313 U.S. 283, 285 (1941) (federal bankrutpcy statute "[i]ntended to be nationwide in its application" and not "controlled or varied by the particular characterization by local law"). By allowing the States to create new "claims" after a federal bankruptcy discharge, the Seventh Circuit has jeopardized the fundamental predictability and stability of the uniform federal bankruptcy laws.[10]

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[9] Indeed, some courts have held that a "claim" arises at the time the debtor engages in the conduct on which the claim is based *even where that conduct does not result in any evident injury until later. See, e.g., Grady v. A.H. Robins Co.*, 839 F.2d 198, 201 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988); *In re Waterman S.S. Corp.*, 141 B.R. 552 (Bankr. S.D.N.Y. 1992); *In re Edge*, 60 B.R. 690, 701-02 (Bankr. M.D. Tenn. 1986). *But see Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1275-77 (5th Cir. 1994); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 943 (3d Cir.), *cert.denied*, 474 U.S. 864 (1985).

[10] *See also The Federalist* No. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed

(continued...)

This case offers a compelling example of the danger. Although the Milwaukee Road went into bankruptcy almost *twenty years ago*, and had its debts discharged over *ten years ago*, the Seventh Circuit has now allowed a creditor to file a potentially enormous claim against its successor-in-interest, petitioner CMC Heartland Partners, which has never been involved in the railroad business at all. (Petitioner is in the business of real estate management and development.) The eight-year duration of the Milwaukee Road bankruptcy proceedings (from 1977 to 1985) underscores the careful attention given to discharging the Milwaukee Road's debts in an orderly, equitable, and comprehensive manner. Union Pacific could easily have preserved any and all claims involving environmental contamination at the Tacoma railyard, regardless of the legal basis of liability, by simply filing during the Milwaukee Road bankruptcy proceeding a bare-bones proof of claim parroting the contractual indemnification language in the 1980 purchase agreement. Having failed to do so, Union Pacific should not be allowed to frustrate the "fresh start" provided by the 1985 discharge.

The Seventh Circuit's conclusion that Union Pacific's MTCA claim is not barred, moreover, is especially peculiar in light of the fact that the MTCA is closely modeled on CERCLA. *See* App. at 7a, 10a-11a; *see generally* Comment, *Through the Looking Glass: A Comparison of Covered Persons, Defenses, and Liability under CERCLA and the Washington State Model Toxic Control Act of 1988 (Initiative 97, 1988 General Election)*, 25 Gonz. L. Rev. 253, 254 (1990). What the Seventh Circuit gave with one hand, then, it took away with the other: it allowed Union Pacific to bring under state law the CERCLA claim that it was barred from bringing under federal law. That result makes no sense. Union Pacific clearly knew (or should have known) of the need to file a

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[10] (...continued)
into different States, that the expediency of it seems not likely to be drawn into question.")

contingent claim based on the contamination at the Tacoma railyard during the Milwaukee Road bankruptcy proceedings. A State cannot circumvent the federal bankruptcy laws by simply purporting to attach new, cumulative, or duplicative legal consequences to conduct that occurred before a federal bankruptcy discharge.[11]

C. The Circuits Are Divided As To The Point In Time At Which A Federal Bankruptcy "Claim" Arises.

The Seventh Circuit is not the first circuit to fall into the error of holding that the point at which a federal bankruptcy "claim" arises is to be determined by reference to state law. The Third Circuit has made the same mistake, holding that the point at which a "claim" arises for purposes of the federal bankruptcy laws turns on the point at which a cause of action accrues under state law regardless of when the events underlying the claim occurred. *See In re Frenville Co.*, 744 F.2d 332, 335-36 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). That approach, like the Seventh Circuit's approach in this case, "confuse[s] the existence of a present right of action or access to the courts with the existence of a 'claim' for bankruptcy purposes." *In re Edge*, 60 B.R. at 704. The *Frenville* Court's reliance on state law to determine the point at which a federal bankruptcy claim arises has been expressly rejected by three other circuits. *See, e.g., In re Piper Aircraft Corp.*, 58 F.3d 1573, 1576-77 (11th Cir. 1995); *In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993); *Grady v. A.H. Robins Co.*,

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[11] The same analysis does not necessarily apply where *federal* law purports to impose a new post-discharge liability. Congress, unlike the States, enjoys power to impose new liabilities inconsistent with the federal bankruptcy laws—assuming that such liabilities are not unconstitutionally retroactive. *See, e.g., In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995); *In re Penn Central Transp. Co.*, 944 F.2d 164, 168 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992). Thus, whereas the federal bankruptcy laws must be reconciled with inconsistent federal enactments, those laws trump inconsistent state enactments outright.

839 F.2d 198, 201-02 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988).[12]

The confusion engendered by *Frenville* and exacerbated by the opinions below creates substantial difficulties for the companies considering reorganization and the courts that must assist them. Determining, for example, when environmental claims arise under the bankruptcy laws and thus whether such "claims can be discharged or survive as a liability of the reorganized company can be determinative of whether there can be a successful reorganization." Steven E. Sherman, *Environmental Issues Facing High-Tech Companies In Chapter 11 Proceedings*, in *Computer Law* (Sept. 1994). "Given the importance of this issue and the emerging conflicts among the circuits, it would be surprising if this issue is not soon addressed by the Supreme Court." *Id.*[13]

Both the Third and Seventh Circuits, in sum, have erroneously "replace[d] the federal definition of 'claim' . . .

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[12] Many courts have recognized the split in authority. *See, e.g., In re Fairchild Aircraft Corp.*, 184 B.R. 910, 923 (Bankr. W.D. Tex. 1995) ("*Frenville*'s reliance upon state law has been rightly criticized by other courts as being inconsistent with the intended breadth and scope of the statute and seems to have been rejected in all circuits save its place of origin."); *In re Food Barn Stores, Inc.*, 175 B.R. 723, 730 (Bankr. W.D. Mo. 1994) ("The *Frenville* decision has been criticized or rejected by many courts."); *In re Grynberg*, 143 B.R. 574, 577 (Bankr. D. Colo. 1990) ("[T]he *Frenville* decision has been discredited and is generally not followed outside of the Third Circuit.").

[13] Other commentators and bankruptcy practictioners have also noted the need for clarification of the confusion. *See, e.g.*, Harvey R. Miller *et al.*, *Representing the Secured Creditor In Chapter 11 Cases*, in *Formulation and Confirmation of Chapter 11 Plans Under the Bankruptcy Code* (PLI Com. Law & Practice Course Handbook Series No. A4-4457, 1994); Karynne G. Popper & Alison N. Zirn, *The Bottomless Pit: The Struggle to Achieve Judicial Consistency In the Application of CERCLA In Bankruptcy Proceedings* (PLI Com. Law & Practice Course Handbook Series No. A4-4453, 1994); Case Note, In Re Jensen: *Demonstrating the Need for Supreme Court Resolution of the Conflict Between CERCLA and the Bankruptcy Code*, 9 *J. Land Use & Envtl. L.* 179, 190 (1994).

with the narrower state concept of 'cause of action[.]'" *In re Amfesco Inds., Inc.*, 81 B.R. 777, 782 (Bankr. E.D.N.Y. 1988). The significance of that error cannot be overstated. Those two circuits now allow state law to circumvent federal bankruptcy law at will by creating new liabilities based on pre-discharge conduct.

The resulting parade of horribles is far from speculative: it is manifest in this very case. The Seventh Circuit has allowed the State of Washington, years after the discharge of the Milwaukee Road's debts, to impose on petitioner significant new liability based wholly on pre-discharge events. The federal bankruptcy laws neither authorize nor tolerate that result.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Debtor.

CMC HEARTLAND PARTNERS,

Plaintiff-Appellant, Cross-Appellee,

v.

UNION PACIFIC RAILROAD,

Defendant-Appellee, Cross-Appellant.

Nos. 95-1412, 95-2986

Argued Jan. 4, 1996.
Decided Feb. 28, 1996.

Rehearing and Suggestion for Rehearing En Banc Denied April 3, 1996.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 77 B 8999; George W. Lindberg, Judge.

Robert H. Wheeler (argued), Mark Leipold, Oppenheimer, Wolff & Donnelly, Chicago, IL, for Appellant.

Raymond H. Groble, III (argued), Ross & Hardies, Chicago, IL, for Appellee.

Jerold S. Solovy, Jenner & Block, Chicago, IL, for Debtor.

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

TERENCE T. EVANS, Circuit Judge.

Like the Energizer Bunny, litigation growing out of the Milwaukee Road's bankruptcy proceedings keeps going and going and going. Today, we issue another opinion—to be added to more than a dozen others—in a case stemming from the reorganization of the railroad which began in 1977.

The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, better known as the Milwaukee Road, came to the end of the line in 1977 when it petitioned for reorganization pursuant to § 77 of the Bankruptcy Act of 1898, formerly 11 U.S.C. § 205 (1976) (repealed 1978). The United States District Court for the Northern District of Illinois served as the reorganization court.

In accordance with procedures under the Bankruptcy Act, the reorganization court established deadlines, or bar dates, for the filing of claims against Milwaukee Road, the estate, and its trustee. The first bar date was September 10, 1985, which established the deadline for all post-petition claims (claims arising against Milwaukee Road during the period of reorganization). Notice of this bar date was sent to all known creditors and published in *The Wall Street Journal*.

On November 12, 1985, the reorganization court entered a consummation order. This order became effective on November 25, 1985, the consummation date. The consummation order set forth a new bar date of December 26, 1985, for claims that arose between the prior September 10 bar date and the November 25 consummation date. This order bars and forever discharges all untimely claims against the trustee, the Milwaukee Road, and its successors and assigns.

The question we face, for the second time, is whether certain claims of the Union Pacific Railroad are among those properly barred by the reorganization court. The claims arise

out of an environmental cleanup of a railyard located within the Commencement Bay/Nearshore Tideflats Superfund site in Tacoma, Washington. Union Pacific purchased the land from the Milwaukee Road in 1980 and, as the owner of the land (at least the owner at the time the appeal was filed but more about that later), faces liability for the cleanup. It filed claims for the cleanup against CMC Heartland Partners, successor-in-interest to the Milwaukee Road, under both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, and the Model Toxics Control Act of the State of Washington, Wash.Rev.Code Ch. 70.105D.010 *et seq.*

We first encountered the question in 1993. A brief review of our decision in *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 3 F.3d 200 (7th Cir.1993), will set the stage for our analysis of the present appeal.

We noted that the situation required us to attempt to reconcile conflicting goals of laws that deal with environmental cleanups and those of the bankruptcy code designed to give debtors a "fresh start." In that context we determined that claims subject to the claims bar included "contingent claims." In the context of CERCLA, a contingent claim exists, we said, when a party potentially liable for response costs under the Act can tie a debtor to a "known release of a hazardous substance." At 202. Under that formulation we determined that Union Pacific's CERCLA claim was barred.

However, the Washington state Model Act became effective in 1989, four years after the bar date. We joined other courts, *e.g.*, the Court of Appeals for the Third Circuit—*In re Penn Central Transp. Co.*, 944 F.2d 164 (1991), *cert. den.* 503 U.S. 906 (1992)—in concluding that claims based on a statute enacted after the discharge date are not barred.

That was not the end of the issue. CMC argued that two Washington statutes, the Water Pollution Control Act, Wash.Rev.Code Ch. 90.48, and the Hazardous Waste Management Act, Wash.Rev.Code Ch. 70.105, which existed prior to

the bar date, provided the same or similar relief as the Model Act and thus barred the claim. We remanded the case to the reorganization court for a determination "as to what liabilities under the Model Act existed in 1985 by virtue of Washington state statutes then in effect."

On remand, the district court did an admirably thorough job. Judge George W. Lindberg referred the issue to Magistrate Judge W. Thomas Rosemond, Jr., who compared the Model Act to those two statutes and a third, which CMC added to the mix after remand, the Washington nuisances statute, Wash. Rev.Code Ch. 7.48.140. Judge Rosemond issued a recommendation that the claim not be barred. Judge Lindberg considered objections to the recommendation and, with minor modifications, also concluded that the claim was not barred—that Union Pacific was not subject to the same liability for cleanup of the railyard under prior Washington statutes as it was under the Model Act and, therefore, its claim for contribution from CMC did not exist prior to the enactment of the Model Act. CMC appeals that decision as well as a later decision on its Rule 60 motion in the district court based on newly discovered evidence.

In addition, because Union Pacific sold the land to the Port of Tacoma during the pendency of the appeal, Union Pacific seeks to substitute the Port as the party prosecuting this case. We decline to substitute parties. This appeal will proceed with the original cast. Given the outcome of this appeal and the agreement between Union Pacific and the Port, we find that there is no reason to order substitution.

As to the appeal itself, our standard of review in the many Milwaukee Road cases was set out some time ago: Because the district court's entry of an injunction in this case was both a bankruptcy decision and an interpretation of its prior consummation order, we review the court's decision to bar [the creditor's] claims for abuse of discretion. Nonetheless, in applying the abuse of discretion standard, we do not give equal deference to every aspect of a court's decision. The

abuse of discretion standard is used to evaluate the reorganization court's application of the facts to the appropriate legal standard, and the factual findings and legal conclusions underlying such decisions are evaluated under the clearly erroneous and de novo standards, respectively. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 779-80 (7th Cir., 1992). The decision on the Rule 60 motion is subject to considerably more deference. It is reviewed for an abuse of discretion.

The railyard in Tacoma was owned and used by the Milwaukee Road from the early years of this century. In 1980, Union Pacific, with the authorization of the reorganization court, purchased the Tacoma site from the trustee and later assigned it to a wholly owned subsidiary, the Oregon-Washington Railroad and Navigation Co. The purchase agreement contained an indemnification clause for claims arising out of the operation of the property prior to March 12, 1980.

After purchasing the site, Union Pacific removed existing structures and let the land stand vacant. In 1980, Union Pacific's own inspection of the property revealed that the area of the site used for diesel fueling was saturated with oil which, along with contaminated dirt, would probably have to be removed.

The railyard is in a highly industrial area. In October 1981, the United States Environmental Protection Agency placed the area on the Agency's National Priority List. The Superfund site was described as one of the ten most hazardous sites in the country. In 1982 the State of Washington commissioned an environmental study of the railyard, and the EPA investigated the site in 1985.

Union Pacific also owned other property within the Superfund site and had dealings with the EPA in connection with two of them. One was an abandoned railway tunnel. The EPA notified Union Pacific in 1982 that it was a potentially responsible party for the cleanup of that site. Later, however,

the EPA determined that the tunnel was not the source of contamination and discontinued its investigation.

The other site was Union Pacific's Tacoma fueling facility. The Department of Ecology of the State of Washington investigated oil contamination in the City of Tacoma waterway in 1982 and, under Washington's Water Pollution Control Act, directed Union Pacific to take remedial action. Union Pacific commissioned a groundwater investigation. Although the investigation revealed no groundwater contamination, Union Pacific, with state approval, removed the top foot of soil at the facility.

Then in 1990, Union Pacific decided to sell the railyard and, in preparation for the sale, commissioned an environmental audit. The audit, completed in June 1990 by a company called Applied Geotechnology, found subsurface contamination of the soil by petroleum hydrocarbons. The audit also identified potential contamination from metals and solvents. As required by law, Union Pacific notified both the EPA and the State of Washington of these findings.

The State notified Union Pacific that it was potentially liable for cleanup of the site under the Model Act. The EPA notified the company that it was also a potentially responsible party under CERCLA. Union Pacific and the State entered into an agreement for remediation of contamination at the railyard.

It was then, on September 9, 1991, that Union Pacific served CMC with a demand for settlement negotiations regarding the cleanup. CMC filed a motion in the reorganization court to enjoin Union Pacific, under the consummation order, from asserting any claims arising out of the cleanup of the railyard. Union Pacific filed a complaint in the Western District of Washington for contribution under CERCLA and the Model Act.

This summary brings us to the issue at hand. Should the claim under the Washington Model Act be barred? We have previously noted that Union Pacific's CERCLA claim is

barred. In fact, in 1996, as we look back at the situation, it seems surprising, if not shocking, that Union Pacific did not file a contingent CERCLA claim. Also from our 1996 vantage point, it is perhaps less surprising, but nevertheless worthy of notice, that Union Pacific did not file a contingent claim under any possibly relevant existing state statute.

But questions regarding whether the existence of claims under prior statutes bars a claim now under the Model Act can only be fairly answered by viewing the world from a 1985 perspective, not from our perspective in 1996. We must resist the temptation to use 20-20 hindsight.

What was the 1985 perspective? It can best be understood by a brief glance at the history of CERCLA, which is, after all, the inspiration for Washington's Model Toxics Control Act. CERCLA is the source of our current understanding that owners *as owners* can be responsible for cleanup costs.

CERCLA became effective on December 11, 1980, ten months after Union Pacific purchased the railyard. Tremendous changes in environmental law have occurred in the 15 years since the passage of the Act. One commentator has said that with one possible exception, CERCLA "stands alone as a conspicuous example of legislative consequence outdistancing even the boldest imagination of its sponsors."[1] He points out that looking back in 1985, Congress could believe that CERCLA was aimed at a relatively limited problem and that cleanup was a relatively inexpensive affair involving scraping off some soil.[2]

And, in fact, CERCLA was a sleeper at first. It was widely thought to be a short-range law; it had a self-destruct provision of September 30, 1985. Prior to reauthorization in 1986, it had accomplished long-term total cleanup of only 14

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[1] William H. Rodgers, Jr., *Environmental Law*, at 685 (2d ed. 1994).

[2] *Id.*

sites.[3] Furthermore, the political climate was not conducive to bold environmental initiatives. The EPA administrator appointed in 1981 was reluctant to use the full authority provided by the Act. She and other top administrators wanted to limit the program to five years, and they minimized the extent of hazardous waste problems.[4]

With the full power of CERCLA not yet fully understood or acknowledged, it was unlikely that states would assume that their existing, traditional environmental statutes could provide the kind of relief that CERCLA would eventually be seen to provide. In fact, states were unsure of what their powers were. On March 10, 1986, four months after the bar date in this case, the Supreme Court struck down a New Jersey state cleanup tax law on the grounds that CERCLA preempted that particular type of state action. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986). In 1986, Congress repealed the section on which the Court relied, and it is now, as we stated in our prior decision in this case, quite clear that CERCLA does not preempt state action. *See also Burlington Northern R.R. v. Time Oil Co.*, 738 F.Supp. 1339 (W.D.Wash.1990).

The expansion of the influence of CERCLA came primarily as a result of the 1986 reauthorization bill, the Superfund Amendments and Reauthorization Act of 1986 (SARA). A look at a few things SARA added to the law will show what was missing in the original bill. SARA expanded the types of costs which could be recovered from responsible parties. These now include virtually every conceivable expense, including health assessments and health effects studies, and interest from the date that payment is demanded. See § 9607(a)(4)(D). It provided specifically for actions for contribution. See § 9613(f). It dealt with the unanswered

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[3] *Superfund II: A New Mandate*, Environment Reporter, Vol. 17, No. 42 (Feb. 13, 1987), at 3.

[4] Environment Reporter, at 10.

question as to how clean is clean. It provided for explicit cleanup standards, stating that remedial actions which permanently reduce toxics are to be preferred over remedial actions which do not involve permanent reduction. See § 9621(b). Significantly for the present case, SARA also gave the states the right to substantial and meaningful involvement in cleanup efforts. § 9621(f).

Early case law also shows the way courts were feeling their way toward the strong CERCLA that now exists. In 1983, courts were struggling with the causation issue. In *United States v. Wade*, 577 F.Supp. 1326 (E.D.Pa.1983), the court considered whether the Act required traditional proof that a defendant caused the harm. Only after much discussion did the court determine that the Act imposed liability on certain persons, without proof that their specific waste caused the necessity for a cleanup. As late as 1985, in *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir.1985), the court was still considering arguments that CERCLA applied only to the entity which was the owner of the property at the time of the discharge and that there must be a showing of causation. The court ultimately rejected both contentions, holding that CERCLA "unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation." At 1044. The court stated a proposition used as a starting point today, but it was not always so.

Given this historical context in 1985, did Union Pacific have a contingent claim, based on the three existing Washington statutes, which would bar its claim based on Washington's 1989 Model Act? Today, CMC asks us to interpret the statutes creatively to say that Union Pacific would have known in 1985 that it, as owner, might have been held responsible for allowing seepage, identifiable as from the railyard, that anyone would know must have gotten into the ground water and that therefore it could be ordered to remediate the site permanently. Was such an interpretation of the Washington statutes within the realm of possibility in 1985,

or would Union Pacific have been considered almost frivolous for filing with the bankruptcy court a claim for contribution based on such potential liability? For that matter, is such an interpretation possible today?

We have reviewed de novo the conclusions of the district court regarding these issues and conclude that the court was correct. The Washington statutes did not provide the comprehensive liability or remedy found in the Model Act.

The Washington Model Act was the result of a statewide initiative. The bill, which became effective on March 1, 1989, as we said, is modeled after CERCLA/SARA but in some ways seems even clearer. For instance, CERCLA lists covered persons as the "owner and operator" of a hazardous waste site. That phrase prompted litigation in which arguments were made regarding whether to be a covered person one had to be both an owner and an operator or whether "and" actually meant "or" in that context. *See, e.g., United States v. Maryland Bank & Trust Co.*, 632 F.Supp. 573 (D.Md.1986). The Model Act stated clearly that covered persons included the "owner or operator." § 70.105D.040(1)(a). With narrow exceptions, the Model Act imposes strict liability on an owner of property based merely on ownership without regard to what actions the owner took on the property to cause pollution. The owner of the site is a person potentially responsible for the cleanup, whether or not it caused the pollution. The Act also recognizes the difficulty of identifying with precision the parties responsible for hazardous waste sites, and thus it permits joint and several liability. § 70.105D.010 (4).

The Washington statutes existing in 1985, which we will soon discuss, often impose liability—sometimes strict liability—on the owner of a property. However, strict liability attaches based on an owner's activities at the site. The statutes are grounded in a traditional version of strict liability; that is, strict liability as a theory of recovery based on the idea that a defendant *engaged in some kind of activity* which exposed

others to a risk of harm and that the activity justified allocating the risk to the defendant, even though he acted with reasonable care—that is, it is not necessary to prove negligence. See Prosser & Keeton, *The Law of Torts* 653 (1984).

Liability under the existing statutes would require difficult matters of proof. Union Pacific took some actions at the site—removing structures, etc. Looking back, CMC urges us to say that the Department of Ecology could have attempted to prove that Union Pacific's actions—taken arguably to clean up the site—actually disrupted the land and caused pollution. Being realistic, we have to recognize how highly unlikely that is. Furthermore, the proof of harm would involve showing that the petroleum hydrocarbons from the railyard did, in fact, seep into the waters of the state. It is easy to look back and say, "Well, of course, they must have," but such speculation does not proof make. A remote possibility of liability under the existing statutes should not bar a claim under the Model Act.

In addition, enforcement provisions of the Model Act are like those in CERCLA, not those that traditionally existed. The Model Act has as its purpose the protection of each person's "fundamental and inalienable right to a healthful environment." § 70.105D.010(1). To ensure that cleanup is accomplished, it, like CERCLA, has strong enforcement provisions. After determining that "remedial action is in the public interest" the state can "issue orders requiring potentially liable persons to provide the remedial action." Refusal to conduct the cleanup can result in draconian penalties. A person who claims to have been improperly required to take remedial action must take the action first and contest the order with the department or in court later. See § 70.105D.050. The Model Act is, like CERCLA, a statute under which—as we pointed out in another Milwaukee Road case—persons needlessly told to clean up may recover costs only after they have done so: "In the meantime they must get the lead out"—or the petroleum hydrocarbons. *In re CMC Heartland Partners*, 966 F.2d 1143, 1148 (7th Cir.1992).

Having made our generalizations, we turn to a discussion of the individual Washington statutes.

The Water Pollution Control Act, Wash.Rev.Code § 90.48.080, provides: **Discharge of polluting matter in waters prohibited**. It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the commission, as provided for in this chapter. CMC argued in the district court, as it does here, that the Water Pollution Control Act (WPCA) is a strict liability statute which could apply in this case because the pollutants on the railyard likely "seep" into the waters of the state. The district court properly rejected the notion that this statute provided a contingent claim which would bar a claim based on the Model Act.

CMC seeks comfort in a 1992 decision of the Washington Pollution Control Hearings Board which held that the WPCA imposes strict liability and, in fact, that liability may be imposed on the landowner. *Nordevan v. State of Washington, Dep't of Ecology*, 1992 WL 172977 (1992). Unfortunately for CMC, a look at the facts in *Nordevan* shows how different that situation is from that at the railyard.

Nordevan is a company which buys, clears, and prepares land for sale to developers. The land in question was on a steep slope with a creek running through it. *Nordevan* obtained various permits and began clearing the land. And, of course, as the board specifically found, it rains a lot in Washington. There were clear, obvious, and serious erosion problems which muddied the creek. The sophistication required to establish this violation is far less than would be necessary to establish the pollution of groundwater from the Union Pacific site. In imposing liability on Nordevan, the board stated that the Water Pollution Control Act was a strict

liability statute. Nordevan had "drained, suffered or caused the discharges into the waters of the state" and was therefore strictly liable.

Further, Nordevan had allowed a utility company a limited utility easement. In what CMC argues is an imposition of liability on an owner *as owner*, the board said that Nordevan, as the owner of the property, "remained responsible for the discharge of potential pollution." We disagree with CMC's interpretation.

The manner in which liability attached to the owner in *Nordevan* is similar to the liability on the owner in *Sea Farms, Inc. v. Foster & Marshall Realty, Inc.*, 42 Wash.App. 308, 711 P.2d 1049 (1985). There the court considered oyster beds "negligently damaged by the construction of a marina...." Sea Farms sued both the developer and the project engineer of the marina. The owner of the land attempted to pass off its liability onto the general contractor. That it was not permitted to do. The duty to comply with the permit which had been issued to the owner to build the marina was nondelegable. The owner's motion for summary judgment was denied because it had a duty not to pollute its own waters, as well as those of others: "Thus the duty to refrain from acts which will pollute waters on another's land may not be delegated to an independent contractor." At 312, 711 P.2d 1049.

In both *Sea Farms* and *Nordevan*, the owner is responsible for pollution done on its land by those acting with its knowledge and permission. It is a far cry from Union Pacific being held liable for pollution caused by the Milwaukee Road during a half century before Union Pacific bought the land.

In addition, although the WPCA prohibits permitting any polluting matter to seep into the waters, and although it would perhaps be possible to show that the pollutants from the railyard have seeped into the groundwater, the proof required to sustain that claim as to the railyard could be formidable. The statute would seem to require that one prove that the

pollutants which exist in the groundwater—or any other water—came from the railyard. The railyard is located in an area of bountiful sources of pollutants. The proof on this point would be considerably more than what is required under the Model Act.

Finally, after defying the orders of the Department of Ecology to control the erosion, Nordevan was fined $15,000, with $5,000 of that amount suspended on the condition that it not violate the law for two years. In short, Union Pacific did not face the same threat of liability and thus did not possess the same claim for contribution under the WPCA as it did once the Model Act went into effect.

The Washington Hazardous Waste Management Act, Wash.Rev.Code § 70.105.050, is even less helpful to CMC. It provides that: No person shall dispose of designated extremely hazardous wastes at any disposal site in the state other than the disposal site established and approved for such purpose under provisions of this chapter, except when such wastes are going to a processing facility which will result in the waste being reclaimed, treated, detoxified, neutralized, or otherwise processed to remove its harmful properties or characteristics. "Dispose or disposal" is defined as "the discarding or abandoning of hazardous wastes or the treatment, decontamination, or recycling of such wastes once they have been discarded or abandoned." § 70.105.010(4). It is not necessary to say much more about a potential Union Pacific claim under this statute than that the district court was right to reject the argument that one might have existed.

The statute refers clearly to those who dispose of waste at disposal sites, not to those who own land on which wastes were allowed to gather by a previous owner. Union Pacific would not have had occasion to be concerned about a potential claim under this statute. CMC does not provide us with any cases in which liability has been established in similar circumstances.

Finally, we turn to Washington's nuisance statute. The statute is not a model of efficiency. Several sections of the Act could conceivably be argued to be applicable to this case. Section 7.48.010 defines actionable nuisances: The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction in the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

Section 7.48.120 defines nuisance: Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property. Then § 7.48.130 defines public nuisance: A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal. Section 7.48.150 says everything in 7.48.130 is a private nuisance. If all that was not enough, § 7.48.140 enumerates public nuisances. Subsection (2) is the one argued to be relevant: To throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, stream, lake, pond, spring, well, or common sewer, street, or public highway, or in any manner to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake, or well, to the injury or prejudice of others[.] The statute provides for abatement of the nuisance. See § 7.48.250.

What seems clear from a simple reading of the statutes is that parlaying a claim based on those statutes into something approaching that arising from the Model Act would be more than an uphill battle.

In 1985, the Supreme Court of Washington discussed a private nuisance action on certification from the District Court for the Western District of Washington. The discussion sheds light on the nature of a nuisance action. A nuisance action required a "substantial and unreasonable interference with [the] use and enjoyment of" one's property. *Bradley v. American Smelting and Refining Co.*, 104 Wash.2d 677, 709 P.2d 782 (1985). We could not say with confidence that Washington courts would interpret that requirement sufficiently broadly to allow a claim regarding the railyard. It is, as we have noted, located in a highly industrial area, identified as a Superfund site. The railyard could hardly affect the rights of the "neighborhood." See § 7.48.130. Union Pacific could as easily have a claim against other property owners within the site. And while the entire site could be alleged to affect the rights of the "entire community" (*id.*), it would be hard to single out Union Pacific and would be a formidable challenge to sue all of the property owners within the site.

CMC calls our attention to *Miotke v. City of Spokane*, 101 Wash.2d 307, 678 P.2d 803 (1984), which involved a determination that a violation of the WPCA can support a claim for nuisance. Of course, before there can be a nuisance under this theory, there must be a finding of a violation of the WPCA, which we have just discussed as it relates to this case. In *Miotke*, the city, in violation of a waste discharge permit, discharged 100 million gallons of raw sewage into a river, which was at a relatively low flow. The sewage went downstream to a lake on which several persons had constructed lake homes. The lake became a putrid mess. It is true—and not surprising—that a claim for nuisance was found to exist on these facts. Even so, the court noted that the litigation was "protracted and complex." 678 P.2d at 806. How much more difficult would it be to show a violation in the present case?

Furthermore, because of the railyard's location, there are many other sources of pollution. In order to obtain relief from Union Pacific under a nuisance theory, the state would be required to identify pollution which could be traced to Union

Pacific. *See Maas v. Perkins*, 42 Wash.2d 38, 253 P.2d 427 (1953); *Smith v. Rodene*, 69 Wash.2d 482, 418 P.2d 741 (1966). That is different in kind from a showing that there is hazardous waste on property of which the defendant is the owner.

CMC urges us to superimpose the Model Act on the nuisance statute and find that the nuisance statute provides some of the relief set out in the Model Act. As a practical matter, it does not. For all these reasons, we conclude that the district court correctly determined that Washington statutes existing in 1985 did not form the basis for the filing, by Union Pacific, of a contingent claim in the Milwaukee Road bankruptcy proceeding.

CMC also has appealed the denial of its Rule 60 motion in which it claimed that new evidence required relief from the judgment.

CMC is entitled to relief from the district court's final judgment only if it can present "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Federal Rule of Civil Procedure 60(b)(2). In order to prevail on its motion, CMC must meet the following prerequisites: 1. The evidence was discovered following trial; 2. Due diligence on the part of the movant to discover the new evidence is shown or may be inferred; 3. The evidence is not merely cumulative or impeaching; 4. The evidence is material; and 5. The evidence is such that a new trial would probably produce a new result. If any of these prerequisites are not met, CMC cannot prevail on its motion.

The denial of a Rule 60(b)(2) motion will not be overturned unless the district court abused its discretion. *McKnight v. United States Steel Corp.*, 726 F.2d 333, 335 (7th Cir.1984). To establish an abuse of discretion, CMC must show that no reasonable person could agree with the court; if reasonable persons could disagree as to the propriety of the

court's action there is no abuse of discretion. *Lee v. Village of River Forest*, 936 F.2d 976 (7th Cir.1991).

The newly discovered evidence was a November 1994 feasibility study regarding environmental cleanup of the site; a November 1994 letter from the Washington State Department of Ecology to the Port allegedly indicating that the department could direct a cleanup of the site under prior statutes; the sale agreement between Union Pacific and the Port of Tacoma, in which the Port agrees to indemnify Union Pacific from claims under any environmental laws; and an excerpt from an April 1993 hydrogeologic characterization report prepared by a Union Pacific subsidiary.

Conveniently, the newly discovered documents allegedly showed that contrary to the district court's ruling, affirmative acts on Union Pacific's part were not required before cleanup liability attached, and even if they were, Union Pacific had engaged in such acts. It was not an abuse of discretion for the court to find that this evidence was not new or, to the extent it was new, that it was not material and would not have changed the underlying decision. We agree with the district court and furthermore find that the newly discovered evidence would not have changed the analysis in our de novo review of the underlying decision.

The decisions of the district court are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Debtor.

CMC HEARTLAND PARTNERS,

Plaintiff-Appellant, Cross-Appellee,

v.

UNION PACIFIC RAILROAD,

Defendant-Appellee, Cross-Appellant.

Nos. 92-3713, 92-3790.

June 8, 1993.

Decided Aug. 18, 1993.

Raymond H. Groble, III (argued), Ross & Hardies, Chicago, IL, for Union Pacific R. Co.

Michael D. Dabertin, Robert Wheeler (argued), Oppenheimer, Wolff & Donnelly, Chicago, IL, for CMC Heartland Partners.

James M. Amend, Kirkland & Ellis, Chicago, Michael L. Gesas, Gesas, Pilati & Gesas, Chicago, IL, for Chicago, Milwaukee, St. Paul and Pacific R. Co.

Before COFFEY and MANION, Circuit Judges, and ALDISERT, Senior Circuit Judge.*

ALDISERT, Senior Circuit Judge.

We attempt again to reconcile the conflicting goals of environmental cleanup and a "fresh start" for bankruptcy debtors.

Presented in these cases, here and in other judicial circuits, is the important question whether debtors in bankruptcy who are charged with pollution in the past can be held liable for cleanup costs of hazardous waste at their former business sites.[1] Generally, demands for contribution and reimbursement are made after bankruptcy proceedings are either in advanced stages or have been completed; in these cases the debtors generally assert that the demands are too late because they were made subsequent to bar dates for claims fixed by the bankruptcy courts.

The interface of environmental cleanup laws and federal bankruptcy statutes is never tidy; jurisprudentially, it is somewhat grubby. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 ("CERCLA") and similar state laws, like Washington's Model Toxics Control Act, Wash.Rev.Code ch.

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* Ruggero J. Aldisert, of the Third Circuit, sitting by designation.

[1] *See In re Jensen*, 995 F.2d 925 (9th Cir.1993); *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir.1991); *In re National Gypsum Co.*, 139 B.R. 397 (N.D.Tex.1992); *United States v. Union Scrap & Metal*, 123 B.R. 831 (D.Minn.1990); *In re Edge*, 60 B.R. 690 (Bankr.M.D.Tenn.1986).

70.105D ("the Model Act"), effective March 1, 1989, and predecessor statutes seek to protect public health and the environment by facilitating the cleanup of environmental contamination and imposing costs on the parties responsible for the pollution. The Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330, and its predecessors were designed to give a debtor a fresh start by discharging as many of its debts as possible. The tension between these fundamental aspects of our national policy is profound.

The Supreme Court has indicated that, if possible, these two conflicting objectives should be reconciled. *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 505-06 (1986); *see Ohio v. Kovacs*, 469 U.S. 274, 280-82 (1985); *see also In re National Gypsum Co.*, 139 B.R. 397, 404 (N.D.Tex.1992) ("It is not a question of which statute should be accorded primacy over the other, but rather what interaction between the two statutes serves most faithfully the policy objectives embodied in the two separate enactments of Congress"). The very difficult issue present in cases involving this fundamental conflict—including the case before us—is: When does a "claim" as defined by the Bankruptcy Act for recovery of cleanup costs arise?

I.

The bankruptcy petition in this case was filed under the Bankruptcy Act of 1898. Section 77(b) of that act, former 11 U.S.C. § 205(b) (repealed 1978), provided: "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." *See City of New York v. New York, N.H. & H. R.R.*, 344 U.S. 293, 295 n. 4 (1953). The current version of the code sets out the broad reach of the term in greater detail. "Claim" means:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured,

> or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

When a kindred contention was previously before us in *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 974 F.2d 775 (7th Cir.1992) (hereinafter *Chicago I*), we announced a possible formulation of when a contingent claim arose:

> [W]hen a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim under Section 77.

Id. at 786. Our formulation has been cited with approval by the Court of Appeals for the Ninth Circuit. *In re Jensen*, 995 F.2d 925 (9th Cir.1993).

We have cross appeals filed by Union Pacific Railroad and by CMC Heartland Partners, the successor in interest to the debtor, Chicago, Milwaukee, St. Paul & Pacific Railroad (hereinafter "the Milwaukee Road"). Our task is to determine whether the district court properly applied our definition of a contingent claim to that submitted by Union Pacific Railroad for contribution and indemnity. Union Pacific purchased the property at issue from the Milwaukee Road bankruptcy trustee by agreement dated March 28, 1980. The agreement included a clause by which the bankruptcy trustee and the Milwaukee Road agreed to indemnify Union Pacific and its subsidiaries—

against any and all claims, damages, liabilities, losses or demands whatsoever, and expenses in connection therewith, including reasonable fees of outside counsel, regardless of the source or nature thereof, arising out of the operation of the Properties prior to March 12, 1980. App. at 49.

Union Pacific now faces liability under state and federal law for cleanup of pollution on the property and seeks to enforce the indemnification clause against CMC. CMC responds that any claims for cleanup costs were discharged in the bankruptcy proceedings.

In these cross appeals, we must consider (1) whether the district court was correct in holding that Union Pacific's claim for indemnification of its liability under federal law arose before the discharge and thus was barred; and (2) whether the district court was correct in holding that Union Pacific's claim for indemnification of its liability under state law arose after the discharge and thus was not barred.

Jurisdiction was proper in the trial court based on 28 U.S.C. § 1334. This court has jurisdiction under 28 U.S.C. § 1291. The appeal was timely filed under Rule 4(a) of the Federal Rules of Appellate Procedure.

We hold that the district court properly held that Union Pacific's claim under CERCLA was barred. To the extent that the district court further held that Union Pacific's claim under the Washington Model Toxic Control Act was not barred, we vacate that portion of the judgment and remand with a direction that the district court first determine what liabilities under the Model Act, if any, were imposed under previous Washington statutes, and then decide what, if any, specific cleanup liabilities under previous state statutes were discharged because no claims were timely presented to the bankruptcy court.

II.

The Milwaukee Road petitioned for reorganization on December 19, 1977, under Section 77 of the Bankruptcy Act of

1898, which was then in effect. Union Pacific was a creditor and participated in the bankruptcy proceedings.

On July 12, 1985, the district court entered Order No. 832, which confirmed the debtor's reorganization plan. The order set a bar date of September 10, 1985, for all post-petition claims. Claims arising after September 10 but before the consummation date of November 25, 1985, were required to be filed by December 26, 1985. Under Section 11.2 of the plan, the bar dates apply to—all claims, including claims for contribution and indemnity existing as of the Confirmation Date [July 12, 1985] and Consummation Date [November 25, 1985], respectively. The bar dates provided in section 11.1, however, do not apply to claims for contribution or indemnity based on facts that are unknown, undisclosed and unasserted as of the Confirmation Date and Consummation Date, respectively. App. at 23. The court subsequently entered Order No. 866 on November 12, 1985 ("the consummation order"), which discharged all claims against the Milwaukee Road and its successors and assigns, including CMC, unless those claims had been timely filed. The order also enjoined all persons from asserting claims that had been discharged.

The property giving rise to Union Pacific's claim is a former railyard in Tacoma, Washington ("the railyard"), which had been owned by the Milwaukee Road from the early years of this century. The railyard is located within the Commencement Bay/Nearshore Tideflats Superfund site in Tacoma, Washington ("the Superfund site"), a site whose characterization, remediation and funding were described in numerous national and regional newspapers as early as 1981. The bankruptcy trustee conveyed it to Union Pacific by quitclaim deed, and it was subsequently assigned to the Oregon-Washington Railroad and Navigation Co., a wholly owned subsidiary of Union Pacific. The transfer was authorized by the reorganization court and took place on December 19, 1980.

Union Pacific removed the existing structures on the railyard, and it thereafter stood vacant. By April 1980, Union

Pacific engineers had inspected the site and reported their results in an internal memorandum to Roland Haacke, the company's district engineer. The memorandum included this statement: Diesel fueling area is oil saturated and will probably require removal of surface oil as well as contaminated dirt. Apparently, this covers quite a large area and may require extensive clean-up. Rec. 4, Ex. J-1. Haacke testified that he made several personal inspections of the railyard and observed oil or grease on the ground in the shop area, the roundhouse area and the diesel fueling area. Union Pacific contends that the inspections by Haacke and others gave no indication of any subsurface contamination but revealed only surface contamination.

Meanwhile, hazardous wastes in the area around the railyard came to the attention of the Environmental Protection Agency. EPA placed Commencement Bay and the Nearshore Tideflats on the Interim Priority List in October 1981. In this same highly publicized announcement, EPA described the Superfund site as one of the ten most hazardous sites in the country. Local and national media reported these developments. Rec. 3, Ex. H; *see also Wallace Turner, Tacoma Pollution on "10 Worst" List*, N.Y. Times, Nov. 8, 1981, § 1, at 35. The Union Pacific railyard is entirely within the Superfund site. The proposed inclusion of the Commencement Bay/Nearshore Tideflats area on the first National Priorities List (NPL) was published in the Federal Register. Amendment to National Oil and Hazardous Substance Contingency Plan; The Nation Priorities List, 47 Fed.Reg. 58476 (1982) (proposed Dec. 30, 1982). The site eventually was included on the first NPL, which was issued in September 1983.

The state of Washington commissioned an environmental study of the railyard, focusing on its historical use. The study, by Dames & Moore, was completed in January 1982 and included these findings: During the history of the railyard, many spills of compounds occurred on site, including oil and other compounds transported by rail. Spills were not cleaned up, and the materials were allowed to seep into the ground. The

railroad also cleaned out their rail cars. It was reported that during the late 1950s the material was dumped on site and allowed to disperse into the soil and seep into the waterways. In 1960, the railroad was required to collect copper sulfite and other toxic materials dry and dispose of them on land. Runoff from this site enters the Milwaukee Waterway. This evaluation of the site indicates that the soils at this site are possibly permeated with toxic compounds. Recently, there has been some grading and the tracks were pulled up. This may have resulted in covering the permeated soils with a thin layer of dirt or exposing the contaminated soils to the environment. Rec. 4, Ex. G, at 50. The Dames & Moore study was delivered to the Washington Department of Ecology. Union Pacific states that it did not receive a copy of the study and was not aware of its contents.

Union Pacific owned other property within the Superfund site and had dealings with EPA and the state in connection with two of these properties. EPA found contamination in the vicinity of an abandoned railway tunnel owned by Union Pacific and notified Union Pacific in early 1982 that it was a potentially responsible party. However, EPA determined that the tunnel was not the source of the contamination and discontinued its investigations. Union Pacific interpreted this to mean that it would not be required to participate in the cleanup of the Superfund site.

The state's ecology department also contacted Union Pacific about oil contamination that occurred in the City of Tacoma waterway on February 16, 1982. The source of the spill was determined to be Union Pacific's Tacoma fueling facility, located several miles from the railyard with which the present case is concerned. Under the state's Water Pollution Control Act, Union Pacific was required to take remedial action and then commissioned a groundwater investigation. Although the investigation revealed no groundwater contamination, Union Pacific proposed to remove the top one-foot of soil at the facility to "eliminate the possibility of any diesel fuel

in such soil reaching the storm drains or groundwater." The soil was removed, and the state approved this action.

Finally, in August 1985, several months before the bar dates, EPA completed a Remedial Investigation of the Superfund site. This investigation contained a reference to environmental contamination at the railyard: Milwaukee Railroad was located on the south shore of Sitcum Waterway until 1980. According to Dames & Moore (1982), numerous solid and liquid spills have occurred in this area. The contents of these spills are unknown and the associated potential for release of contaminants to Sitcum Waterway from the spills and railway operations cannot be evaluated. Union Pacific Br. at 10.

Union Pacific later decided to sell the railyard and commissioned an environmental audit that was completed by Applied Geotechnology on June 29, 1990, and disclosed subsurface contamination consisting primarily of petroleum hydrocarbons. The audit also identified potential contamination from metals and solvents. Union Pacific notified both EPA and the state of these findings but contends that it did not know of any subsurface contamination prior to this environmental audit.

The state ecology department notified Union Pacific on October 16, 1990, that the railroad was potentially liable under the Washington Model Act. Union Pacific and the state then entered into an agreement on July 31, 1990, providing for remediation of contamination at the railyard under the act. CMC asserts also that on April 24, 1989, EPA notified Union Pacific that it was a potentially responsible party under CERCLA and thus could be liable for cleanup costs at the railyard.

Union Pacific served CMC on September 9, 1991, with a demand for settlement negotiations concerning cleanup of the railyard. CMC filed a motion in the district court for the Northern District of Illinois to enjoin Union Pacific, pursuant to the consummation order, from asserting any claims arising out of the purchase of the railyard. Union Pacific subsequently

filed a complaint in the district court for the Western District of Washington, seeking declaratory judgment and contribution and asserting claims under the Model Act and CERCLA.

III.

After reviewing the facts, the district court for the Northern District of Illinois considered whether Union Pacific knew of its potential liability under CERCLA and the Model Act before September 10, 1985, the bar date for post-petition claims. *In re Chicago, M., St. P. & Pac. R.R.*, No. 77 B 8999, 1992 WL 316321 (N.D.Ill. Oct. 21, 1992) (hereinafter "D.Ct.Op."). The court concluded that Union Pacific had constructive knowledge of its CERCLA claim by the bar date and identified several facts that supported its determination: The Commencement Bay and Nearshore Tideflats area was identified in 1981 as one of the most contaminated places in the country. D.Ct.Op. at 7. The railyard is included in this area. Union Pacific officials denied that they knew of the 1982 Dames & Moore report, but "this information was available had they sought it out." *Id.* EPA's notice to Union Pacific in 1982 concerning possible contamination from the railway tunnel "was direct notice to Union Pacific that there were environmental investigations occurring in the Commencement Bay Area." *Id.* Union Pacific knew in 1982 of spills at its Tacoma fueling facility, which made the railroad liable for cleanup costs under state law. *Id.* Union Pacific's own engineers had inspected the railyard in 1980 and noted that the site "may require extensive cleanup." *Id.* at 8. The court stated: While Union Pacific may not have had actual knowledge of hazardous waste contamination at the railyard, the facts reveal there was enough information present at the time that the bar dates went into effect that Union Pacific should have been aware of its potential liability. . . . The presence of a number of environmental investigations by state and federal authorities in the Commencement Bay area should have reasonably alerted Union Pacific to the possibility of environmental contamination of an area that was already found to be oil saturated. Enough factual information exists to give Union Pacific constructive

knowledge of a CERCLA claim at the time of the bar dates. *Id.* at 7, 8.

The district court then turned to Union Pacific's claim for indemnity of costs relating to the Model Act and held that this claim was not barred. The court noted that the consummation order was filed in 1985, before the Model Act took effect on March 1, 1989. The court concluded, "Union Pacific could not possibly have known of its liability under a statute that was not in existence until four years after the bar dates were established for filing claims against the Milwaukee Road." *Id.* at 9 (citing *In re Penn Central Transp. Co.*, 944 F.2d 164, 167-68 (3d Cir.1991) (CERCLA claim was not discharged in bankruptcy when consummation order was entered before CERCLA was enacted), *cert. denied sub nom. Penn Central Corp. v. United States*, ___ U.S. ___, 112 S.Ct. 1262 (1992)). The court also rejected CMC's implicit argument that CERCLA preempted state law remedies for hazardous waste contamination. *Id.* at 8.

IV.

Union Pacific argues that the district court erred in determining that Union Pacific had constructive knowledge of its CERCLA liability before the consummation date. CMC argues that the district court erred in determining that Union Pacific could not have known of its state law liabilities until after the consummation order was filed; it asserts that the Model Act did not create new duties but merely recodified existing duties under the state's Water Pollution Control Act, Wash.Rev.Code ch. 90.48, and Hazardous Waste Management Act, Wash.Rev.Code ch. 70.105, and accompanying regulations, Wash.Admin.Code ch. 173-303.

We described the standard of review in *Chicago I*: Because the district court's entry of an injunction in this case was both a bankruptcy decision and an interpretation of its prior consummation order, we review the court's decision to bar [the creditor's] claims for abuse of discretion. Nonetheless, in applying the abuse of discretion standard, we do not give

equal deference to every aspect of a court's decision. The abuse of discretion standard is used to evaluate the reorganization court's application of the facts to the appropriate legal standard, and the factual findings and legal conclusions underlying such decisions are evaluated under the clearly erroneous and *de novo* standards, respectively. 974 F.2d at 779-80.

V.

Our analysis must begin with the definition of a "claim" under the Bankruptcy Act of 1898. We have recognized that Section 77(b) of the Act "broadly defines claims to include 'debts, whether liquidated or unliquidated ... or other interests of whatever character.'" *Chicago I*, 974 F.2d at 780 (quoting former 11 U.S.C. § 205(b) (repealed 1978)).

Union Pacific argues that it did not have sufficient knowledge of its CERCLA liability prior to the consummation date to require it to file a proof of claim. In *Chicago I*, the Washington State Department of Transportation (WSDOT) purchased property from the bankruptcy trustee in 1984. The state's Department of Ecology determined by June or July 1985 that the site was contaminated as a result of a 1979 derailment and spill of copper ore. In August 1985, the Department of Ecology notified WSDOT of the problem and indicated that some tests had been completed and further testing would be necessary. Soil samples were taken in October 1985, and test results were returned in November.

WSDOT did not file a proof of claim before the second bar date of December 26, 1985. The state subsequently sought to recover cleanup costs incurred under CERCLA. The district court held that the claim was barred, and we affirmed.

As previously set forth in detail in Part III, the district court in the present case listed five significant facts indicating that Union Pacific had sufficient knowledge of its potential liability under CERCLA to require it to file a proof of claim. In summary, the court found that the railyard was included in a Superfund site; the Dames & Moore report described contam-

ination at the railyard, a report described by the district court as information that was available to Union Pacific "had they sought it out"; Union Pacific knew of EPA investigations in the area; it knew of its liability under state law for contamination at the Tacoma fueling facility; and its own engineers had noted that the railyard might require extensive cleanup. The court held that Union Pacific had constructive knowledge of its CERCLA claim.

Union Pacific presents a number of counterarguments that essentially challenge the district court's factual finding of constructive knowledge. It argues that it did not anticipate CERCLA liability because petroleum is specifically exempted from coverage. 42 U.S.C. § 9601(14) ("The term ['hazardous substance'] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance. . . ."). *But see* 50 Fed. Reg. 13,460 (April 4, 1985) (commentary to final rulemaking) ("EPA does not consider materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion.").

Although the district court determined that "Union Pacific may not have had actual knowledge of hazardous waste containers at the railyard," on the basis of the record before it, the court could have found actual knowledge as well. The April 1, 1980 in-house engineers' memorandum, prepared shortly after the purchase agreement was entered into, stated that a portion of the railyard "will probably require removal of surface oil as well as contaminated dirt. Apparently, this covers quite a large area and may require extensive clean-up." Although at oral argument, Union Pacific explained that this memorandum "pertained solely to surface spills," its district engineer had testified to seeing "oil on the surface, grease or oil, fuel" on the site. One does not need an engineering degree to conclude that grease, oil and fuel left standing for a long period of time have the capacity to seep into the subsurface of soil. This was *five years* before the bar date.

In any event, the district court did not err in finding constructive knowledge. With EPA conducting a massive investigation of one of the ten most hazardous sites in the country, in which the railyard was located, Union Pacific cannot now argue that it did not know of potential environmental claims regarding the railyard. Our national environmental policy does not permit a commercial landowner in a tainted area to put on blinders or attempt an "ostrich defense."

We are satisfied that the district court's determination that Union Pacific had constructive knowledge of the facts summarized above was not clearly erroneous. From this we conclude that when such knowledge was imputed to Union Pacific, it became "a potential CERCLA claimant [who could] tie the bankruptcy debtor to a known release of a hazardous substance." *Chicago I*, 974 F.2d at 786. We also conclude that on the basis of the Dames & Moore study, the April 1980 inspection of the railyard by Union Pacific engineers, the personal inspections by district engineer Haacke, the public characterization by the EPA of the Commencement Bay area as one of the ten most hazardous sites in the country and other evidence, it can be said, paraphrasing *Chicago I*, that Union Pacific was a potential claimant that had, in fact, made inspections of the site and observed contamination and had available similar information from other sources, and therefore Union Pacific had at least a contingent CERCLA claim under Section 77. *See id.* We conclude further that Union Pacific had this contingent CERCLA claim substantially in advance of the bankruptcy court's bar dates of September 10, 1985 and December 26, 1985.

We hold, therefore, that the district court did not abuse its discretion to bar Union Pacific's CERCLA claims.

In so deciding, we are not pursuing "mechanical juris prudence" in the sense condemned by Roscoe Pound[2] by requiring fealty to bar dates set by bankruptcy judges. We are not vaunting the national bankruptcy policy over environmental concerns. If anything, we are acknowledging the importance of facilitating the cleanup of environmental contamination by placing upon property owners—whether longtime owners or new purchasers—the obligation of performing an environmental audit as early as possible. It is not too much to require a timely examination under any circumstances, but where a present owner expects reimbursement from a predecessor in interest, any delay may preclude relief, because of the intervention of a statute of limitations, or as here, the interposition of dates barring claims imposed by bankruptcy courts.

VI.

We now turn to CMC's appeal challenging the district court's determination that Union Pacific's claim under the Model Toxics Control Act was not barred, because the Model Act did not go into effect until after the 1985 bar dates. CMC acknowledges that the Model Act went into effect after the bar dates and that several courts have held that claims based on a statute enacted after discharge in bankruptcy are not barred. *E.g., Penn Central*, 944 F.2d at 168. CMC distinguishes these cases by asserting, "Union Pacific was aware of existing liabilities to the United States and the State of Washington for clean-up of the Railyard Site, under both CERCLA and existing Washington State statutes." CMC Br. at 24. CMC relies on the state Water Pollution Control Act, Wash.Rev.Code ch. 90.48, and on the Hazardous Waste Management Act, Wash.Rev.Code ch. 70.105, with its accompanying regulations, Wash.Admin.Code. ch. 173-303. These enactments were in effect in 1985, prior to the adoption of the Model Act. Union Pacific vigorously argues that it had

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[2] Roscoe Pound, Mechanical Jurisprudence, 8 Colum.L.Rev. 605 (1908), reprinted in part in Ruggero J. Aldisert, The Judicial Process 304 (1976).

no liability under the laws existing in 1985 and that the Model Act imposed an entirely new species of liability.

We will not meet the question at this time as to what liabilities under the Model Act existed in 1985 by virtue of Washington state statutes then in effect. The district court did not make findings in this respect, and we will remand these proceedings to that court to make this determination in the first instance.

It is suggested that upon remand the parties assist the court by preparing a section-by-section comparison of the Model Act with previously enacted relevant state statutes. Such an analysis could indicate whether a particular type of liability under the Model Act existed under predecessor statutes prior to the bar dates, and whether Union Pacific consequently had a contingent claim for environmental cleanup costs under Washington statutes in effect before the bar dates.

The judgment of the district court is AFFIRMED in part and VACATED in part and the cause REMANDED for further proceedings in accordance with the foregoing.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

April 3, 1996

Before

Hon. Ilana Diamond Rovner, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

Nos. 95-1412 & 95-2986

In the Matter of:

CHICAGO, MILWAUKEE, ST. PAUL &
PACIFIC RAILROAD COMPANY,
Debtor.

CMC HEARTLAND PARTNERS,
Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD,
Defendant-Appellee.

ORDER

On March 13, 1996, CMC Heartland Partners filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges have requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
N. D. ILLINOIS, EASTERN DIVISION

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL &
PACIFIC RAILROAD COMPANY,

Debtor.

No. 77 B 8999.

MEMORANDUM AND ORDER

LINDBERG, District Judge.

This case arises out of the sale in bankruptcy of a railyard in the State of Washington. The purchaser, Union Pacific Railroad Co. ("Union Pacific"), commenced suit in the U.S. District Court for the Western District of Washington against the reorganized corporation, CMC Heartland Partners ("CMC"), for clean-up and response costs incurred under the Comprehensive Environmental Response Compensation and Liability Act, 42 USC §§ 9601 et seq. ("CERCLA") and the Washington Model Toxic Control Act, RCW 70.105D.010 —70.105D.921 ("MTCA"), and for indemnification under the terms of the sale agreement. CMC has moved to enjoin Union Pacific from prosecuting its claims. The court determines that Union Pacific is enjoined from bringing any CERCLA claim

against CMC with respect to the railyard site. This court will not enjoin Union Pacific from bringing any potential claims under the MTCA.

FACTS

On December 19, 1977, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee Road") petitioned for reorganization pursuant to section 77 of the Bankruptcy Act of 1898, formerly 11 USC § 205. This court served as the reorganization court throughout the reorganization proceedings. In accordance with section 77 of the Bankruptcy Act and Bankruptcy Rule 8-401, the reorganization court established bar dates for the filing of claims against Milwaukee Road, the Estate and its trustee. Order No. 832 provided that all post-petition claims, that is, claims arising against or obligations incurred by Milwaukee Road during the reorganization proceedings, were to be filed on or before September 10, 1985. Order No. 832 also confirmed the Trustee's Modified 1985 Plan of Reorganization that defined the kinds of claims to which the bar dates apply. Order No. 866, the Consummation Order, which was entered by the reorganization court on November 12, 1985 and which became effective on November 25, 1985, barred and discharged all claims against the Trustee, the Debtor, and its assigns and successors including CMC, except as provided for in the bankruptcy plan. Order No. 866 also enjoined all persons from attempting to prosecute or assert claims that had been discharged in the bankruptcy proceeding. This court retained jurisdiction to enforce that injunction.

Union Pacific actively participated in the Milwaukee Road reorganization proceedings and had actual notice of the bar dates. Several Union Pacific officers and legal counsel were on the official service list for the reorganization. Counsel for Union Pacific also participated in the reorganization approval plan process.

In March 1980, Union Pacific purchased approximately 100 miles of railroad right-of-way and various railyard

properties in Washington and Idaho from the Trustee in Bankruptcy of Milwaukee Road. One of these railyards was the former Milwaukee Road yard in Tacoma, Washington. As part of the purchase agreement Union Pacific bargained for and received indemnification from the trustee as follows:

> The Trustee and the Milwaukee Road agree to indemnify and save harmless Union Pacific, its lessors subsidiaries and/or affiliates and their respective officers, agents and employees, against any and all claims, damages, liabilities, lawsuits or demands whatsoever, and expenses in connection therewith, including reasonable fees of outside counsel, regardless of the source or nature thereof, arising out of the operations of the properties prior to March 12, 1980; or arising out of the ownership of the properties at anytime, or the operation or use thereof, by the Milwaukee Road after March 12, 1980, and prior to the date of Closing. . . .
>
> This covenant of indemnity shall remain in full force notwithstanding the consummation of the transactions contemplated in this Agreement.

On October 21, 1981, the Environmental Protection Agency ("EPA") published its National Priorities List ("NPL") which indicated that the Commencement Bay/Nearshore Tideflats ("Commencement Bay") area, which encompassed the railyard site, was one of the ten worst hazardous waste sites in the country. This listing was published in the Federal Register on December 30, 1982. The events surrounding the listing and remediation of the site were subsequently discussed in numerous national and regional newspapers. See "EPA Names 115 Worst Toxic Waste Dump Sites in U.S.," the *Washington Post § 1*, pg. A4, October 24, 1981; "Tacoma Pollution in Top 10," *Seattle Post-Intelligencer*, October 24, 1981. The Department of Ecology ("DOE") contracted with a private company, Dames & Moore, to study aspects of the

contamination of the Commencement Bay area. In January of 1982, Dames & Moore published its "Historic Land Use Survey of the Tacoma Tide Flats," in which it identified 117 historical sources of contamination in the Sitcum Waterway, including the railyard site. The Dames & Moore study describes the history of the railyard site:

> During the history of the railyard, many spills of compounds occurred on site, including oil and other compounds transported by rail. Spills were not cleaned up, and the materials were allowed to seep into the ground.
>
> The railroad also cleaned out their rail cars. It was reported that during the late 1950's the material was dumped on site and allowed to disperse into the soil and seep in the waterways. In 1960, the railroad was required to collect copper sulfite and other toxic materials dry and dispose of them on land. Runoff from this site enters the Milwaukee Waterway. This evaluation of the site indicates that the soils at this site are possibly permeated with toxic compounds. Recently, there has been some grading and the tracks were pulled up. This may have resulted in covering the permeated soils with a thin layer of dirt or exposing the contaminated soils to the environment.

In September 1983, the EPA published its first official National Priorities List ("NPL") of 406 hazardous waste sites throughout the country. Included on that list was the Commencement Bay site. In October 1984, the DOE listed the railyard site in its "Monthly Status Report, Commencement Bay Cleanup Sites" for suspected soil and groundwater contamination for past spills.

In August 1985, the DOE and EPA issued a Remedial Investigation (RI). The RI, which relied in part on the Dames

& Moore information, noted that numerous solid and liquid spills had occurred in the area.

Union Pacific's own fueling facilities in Tacoma were investigated by the DOE in 1982. As a result of this investigation, Union Pacific agreed to remove the top level of oil-contaminated soil at the facility to prevent groundwater contamination. Union Pacific was also in direct contact with the EPA concerning potential environmental contamination at an abandoned railroad tunnel.

As the result of a title dispute with the Puyallup Native American Tribe, the railyard stood vacant. Union Pacific's only action with regard to the railyard was to remove the existing structures and clean up the surface of the yard. During the time that the railyard stood vacant, some of Union Pacific's employees became aware of contamination of portions of the railyard's surface by petroleum wastes. In an internal memorandum, a Union Pacific division engineer noted that:

> Diesel fueling area is oil saturated and will probably require removal of surface oil as well as contaminated dirt. Apparently, this covers quite a large area and may require extensive clean-up.

The Engineering Department at Union Pacific was responsible for inspection and for environmental cleanup, either performing the work in house or hiring a private contractor.

In preparation for the sale of the railyard, Union Pacific commissioned an environmental audit of the site. The audit was completed by Applied Geotechnology on June 29, 1990. The audit discovered subsurface contamination consisting primarily of petroleum hydrocarbons but also identified potential contamination from metals and solvents as well. Union Pacific, as required by law, notified the DOE and the EPA of the results of this assessment.

Based on this information, the DOE notified Union Pacific on October 16, 1990 that it was a Potentially Liable

Party ("PLP") with respect to environmental contamination of the railyard. On July 31, 1991, Union Pacific entered into an agreement with the DOE for remediation of the railyard under the provisions of the Washington Model Toxic Control Act ("MTCA").

In a letter dated September 9, 1991, Union Pacific requested CMC, the reorganized Milwaukee Road corporation, to enter into settlement negotiations with Union Pacific concerning the clean-up and response costs to be incurred. CMC responded to the letter by filing this action and requesting the court to enforce the consummation order and enjoin Union Pacific from prosecuting any claims against CMC arising out of Union Pacific's purchase of the railyard. CMC asserts that these claims were not brought before the bar date and were therefore discharged in the reorganization. Not long after CMC filed its motion in this court, Union Pacific filed a complaint against CMC in the U.S. District Court for the Western District of Washington asserting declaratory judgment, CERCLA, MTCA and contribution claims.

DISCUSSION

Order No. 866 of the reorganization court includes a provision which enjoins all "Entities" from prosecuting, pursuing or attempting to institute any suit, action or proceeding against CMC by reason of any obligations incurred by the Debtor of the Trustee except the obligations imposed upon or required to be assumed by CMC by the reorganization plan. This court must now determine whether Union Pacific's claims were required to be assumed by CMC by the reorganization plan. Section 11.2 of the reorganization plan bars all claims "including claims for contribution or indemnity existing as of the Confirmation Date and the Consummation Date, respectively. The bar dates provided in section 11.1, however, do not apply to claims for contribution or indemnity based on facts that are unknown, undisclosed or unasserted as of the Confirmation Date and Consummation Date respectively."

Union Pacific does not deny its involvement in the reorganization proceedings, nor does it deny that it had actual notice of the Confirmation and Consummation Dates. Union Pacific contends, however, that its potential CERCLA claim was unknown at the time of the reorganization proceedings and that, because the MTCA was enacted in 1989, claims arising from this statute were unknowable before the 1985 bar dates. Union Pacific claims that it is entitled to indemnity and contribution because its claims fall under the above-mentioned exception to the bankruptcy bars in section 11.2 of the reorganization plan.

While Union Pacific may not have had actual knowledge of hazardous waste contamination at the railyard, the facts reveal there was enough information present at the time that the bar dates went into effect that Union Pacific should have been aware of its potential liability. The Commencement Bay area, which included the railyard, was listed nationally in the Federal Register as one of the most contaminated areas in America. In addition to this, numerous national and regional newspapers ran stories about hazardous waste contamination at the Commencement Bay area. The railyard was listed as a potential source of environmental contamination in the 1982 Dames & Moore study and in the 1985 DOE Remedial Investigation. While Union Pacific denies that it was aware of either the Dames & Moore study or the Remedial Investigation, this information was available had they sought it out.

In 1982, Union Pacific was informed by the EPA of its potential CERCLA liability for contamination at an old railroad tunnel that it owned in the Commencement Bay area. While this investigation showed no hazardous release from the tunnel, this was direct notice to Union Pacific that there were environmental investigations occurring in the Commencement Bay area.

Union Pacific also knew of an environmental investigation for spills at its own nearby fueling facilities in Tacoma.

As a result of the investigation into their Tacoma railyard by the DOE, Union Pacific agreed to remove the top layer of soil on that facility. Union Pacific argues that because the investigation at this facility did not show any groundwater contamination it may give rise to the inference that such would be the case at the similar Milwaukee Road railyard site. This is a very naive and dangerous inference.

At the railyard site itself, Union Pacific workers noticed oil wastes present on the surface and concluded that because of this contamination, the site "may require extensive clean-up." Union Pacific did, in fact, remove the existing structures on the land and cleaned the surface of the site.

The presence of a number of environmental investigations by state and federal authorities in the Commencement Bay area should have reasonably alerted Union Pacific to the possibility of environmental contamination of an area that was already found to be oil saturated. Enough factual information exists to give Union Pacific constructive knowledge of a CERCLA claim at the time of the bar dates. Knowledge of CERCLA liability before the consummation date bars Union Pacific from asserting any claims under CERCLA against CMC. See *In the Matter of: Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, No. 91-2172 slip op. (7th Cir. Aug. 18, 1992).

Union Pacific's MTCA claim, however, is not barred by the bankruptcy reorganization. CMC argues that since Union Pacific could have brought a CERCLA claim before the bar dates and did not, it should be barred from bringing a similar state law claim although the state statute was not in effect at the time of the reorganization. CMC cites no law in support of its argument. CMC seems to be implicitly arguing CERCLA preemption of Union Pacific's state law claims. More precisely, CMC wants this court to rule that a contingent CERCLA claim preempts a state law claim that has yet to come into existence. CERCLA, however, is very clear that States can enact and enforce statutes that provide additional liability

or requirements with respect to the release of hazardous substances within such state, and that these laws are independent of CERCLA to the extent that they do not allow for double compensation for removal costs or damages. 42 USC §§ 9614(a), 9614(b).

The MTCA had not been enacted by the State of Washington at the time the consummation order was entered. Union Pacific could not possibly have known of its liability under a statute that was not in existence until four years after the bar dates were established for filing claims against the Milwaukee Road. See *In the Matter of Penn Central Transportation Co.*, 944 F.2d 164 (3d Cir. 1991) (CERCLA claim was not discharged in bankruptcy when the consummation order was entered before CERCLA was enacted). Even though the MTCA claim may be similar to the barred CERCLA claim, CMC cites no authority to support barring Union Pacific from prosecuting this claim.

CMC also asserts that a settlement agreement entered into by both Union Pacific and CMC in 1991 releases it from its liability to Union Pacific. The settlement agreement deals primarily with the partitioning of land involved in a claim filed by Union Pacific. The agreement contains the following broad language which is the basis for CMC's argument:

> CMC and UP release and discharge each other from any and all claims raised, or which could have been raised, against each other arising out of the matters, transactions, occurrences or events involved in the Litigation or in the Reorganization Proceedings;

It does not appear that either party had any intention of including potential but unasserted environmental claims when it negotiated this settlement. By its own terms, the settlement agreement is governed by Washington law, which provides that the intent of the contracting parties should be determined by looking at the contract as a whole. *Stender v. Twin City Foods, Inc.*, 510 P.2d 221 (1973). The agreement provides that the

parties intended to settle only claims and counter-claims that had been asserted in litigation in the State of Washington and in the reorganization proceedings in this court. Union Pacific's MTCA claims, which were unasserted at the time of the settlement and had nothing to do with the partitioning of the land, are not released by that agreement.

ORDERED: Pursuant to Order No. 866 of this court, Union Pacific is enjoined from asserting or attempting to prosecute any claims under 42 USC §§ 9601- 9675, (CERCLA) for indemnity or contribution against CMC. Union Pacific is not enjoined from pursuing its claims for indemnity or contribution under the Washington Model Toxic Control Act, RCW 70.105D.010—70.105D.921 (MTCA).

George W. Lindberg
United States District Judge

Date: October 21, 1992

APPENDIX E

UNITED STATES DISTRICT COURT
N. D. ILLINOIS, EASTERN DIVISION

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Debtor.

No. 77 B 8999.

MEMORANDUM OPINION AND ORDER

Before the court is the magistrate judge's Report and Recommendation ("R & R") on CMC Heartland Partners' ("CMC") "Renewed Motion to Enjoin Union Pacific's State Law Claims for Remediation."[1] In the R & R, Magistrate Judge Rosemond recommends that the court deny CMC's renewed motion. CMC has filed objections to the R & R; Union Pacific has filed a reply to CMC's objections.

CMC's objections to the R & R can be grouped into three categories. First, CMC argues that, in reaching the conclusions in the R & R, the magistrate judge mistakenly assumed facts not in the record. Second, CMC maintains that the magistrate judge misapplied the Seventh Circuit's standard pertaining to the definition of a "claim" for the purposes of section 77 of the Bankruptcy Act of 1898. Finally, CMC contends that the magistrate judge improperly interpreted Washington state law.

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[1] For a summary of the facts and procedural history of this case leading up to this motion, see *In the Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 3 F.3d 200 (7th Cir.1993) ("*Chicago III*").

For the reasons that follow, the court overrules CMC's objections to the R & R, and with minor exceptions, adopts the R & R. CMC's renewed motion is denied.

I.

CMC first objects that "[i]n several critical areas, the Magistrate has assumed facts not in the record and then relied upon those facts and inferences therefrom in making his recommendations." CMC Objections ("Objections") at 3.

The first error in this regard, according to CMC, is the magistrate judge's statement that CMC had been charged with pollution in the past. Specifically, the magistrate judge stated:

> Involved in this case was the important question of whether debtors in bankruptcy who were charged with pollution in the past could be liable for clean-up costs of hazardous waste at their former business sites.

R & R at 1. CMC maintains that neither it nor its predecessor, the Milwaukee Road, was ever charged with any pollution activity at the railyard in the past. On the contrary, according to CMC, *"[a]ll of the enforcement activity referenced in the record occurred after Union Pacific acquired ownership"* of the railyard. Objections at 4 (CMC's emphasis). Thus, CMC argues, the magistrate judge incorrectly assumed that this was a case in which CMC had been charged with pollution and was trying to beat those charges by relying on the bar dates.

Union Pacific maintains that CMC takes the magistrate judge's words out of context and ascribes to them a meaning that the magistrate judge never intended. According to Union Pacific, the "charge" to which the magistrate judge referred was not any regulatory action; rather CMC was "charged" with pollution by Union Pacific in its claim for indemnity on the basis that CMC's predecessor contaminated the railyard. Reply at 4-5.

The court agrees with Union Pacific. *Aside from the* above-quoted passage, there is nothing in the R & R that suggests that the magistrate judge believed that CMC had been charged by an official agency with pollution in the past at the railyard. Indeed, it appears that the magistrate judge was simply framing the issue in much the same way as the Seventh Circuit had done in a prior appeal of this case. See *Chicago III*, 3 F.3d at 201 ("Presented in these cases, here and in other judicial circuits, is the important question whether debtors in bankruptcy who are charged with pollution in the past can be held liable for cleanup costs of hazardous waste at their former business sites.").

Second, CMC argues that the magistrate judge confused the railyard with Union Pacific's fueling facility in Tacoma. CMC bases this argument on the magistrate judge's statement that in 1982 Union Pacific "removed some surface soil from the property." R & R at 3. CMC claims there is no evidence that Union Pacific ever removed any soil from the railyard. Objections at 5. Union Pacific argues that the magistrate judge's statement is supported by the record, citing the deposition of Roland Haacke at pages 41-42 and 49-51, and the report of Applied Geotechnology, Inc. Reply at 4-5.

The court's review of these parts of the record reveals no support for the magistrate judge's statement.[2] CMC argues that the magistrate judge made this misstatement because he confused the railyard with Union Pacific's fueling facility, where soil was indeed removed in 1983. A more plausible explanation is that the magistrate judge relied on Union Pacific's representation in its brief that it removed some soil from the railyard. See Reply Br. at 4. Although Union Pacific has failed to provide any record support for the

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[2] In his deposition, Mr. Haacke specifically denied knowing whether any soil was removed from the railyard. As for the report of Applied Geotechnology, Inc., Union Pacific fails to cite to a particular place in the report which supports the magistrate judge's statement. Moreover, the court's review of the sixty plus page report revealed no such support.

proposition that it removed soil from the railyard in 1982, the court does not believe that the magistrate judge confused the railyard with the fueling facility. Nor does the court believe that CMC has adequately explained why this one unsupported statement of fact dooms the entire R & R. Except as to that statement, the court overrules CMC's objections to the factual recitation in the R & R.

II.

CMC's second objection to the R & R concerns the standard for determining whether a party has a "claim" within the meaning of section 77 of the Bankruptcy Act of 1898. The fundamental issue facing the magistrate judge was whether Union Pacific had a "claim" for indemnification (within the meaning of section 77) that should have been brought before the bar dates. The magistrate judge decided that Union Pacific did not have such a claim and hence should not be enjoined from bringing such a claim now.

According to CMC, the magistrate judge used too stringent a test for determining what a "claim" is under section 77. CMC maintains that the magistrate judge erred in assuming that such a claim had to be established with a high degree of certainty. CMC contends that "[t]he proper section 77 test is whether Union Pacific had a contingent claim for contribution, based on the *possible liability* that Union Pacific could have faced under state law." Objections at 7.

Union Pacific takes the position that the magistrate judge correctly applied section 77. Union Pacific points to the following language in *Chicago III* where the Seventh Circuit discusses when a CERCLA claim arises: When a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim under

Section 77. *Chicago III*, 3 F.3d at 202. Adapting this formulation to the issue before the court, Union Pacific suggests that the court should deem a claim to arise under a state environmental statute when the claimant has knowledge of the release of a hazardous substance which the claimant knows will lead to response costs under that statute. Reply at 6.

The proper test for determining whether a claim has arisen under section 77 is a crucial issue on which the parties have offered little helpful authority.[3] The court does not believe that the passage from *Chicago III* relied on by Union Pacific is a proper source from which to cull a standard in this case. As this court interprets that passage, the Seventh Circuit was stating that, under circumstances such as those prevailing in *Chicago III*, a claim arises under section 77 *without question*. The court did *not* appear to be saying that *only* under similarly compelling circumstances would a claim arise.

CMC relies on *Chicago III* and *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 974 F.2d 775 (7th Cir.1992) ("*Chicago I*") as support for its view that Union Pacific had to file a proof of claim before the bar dates as long as it had a "contingent claim" for indemnification. CMC does not elaborate on the meaning of the term "contingent claim." It is "usually said to refer to obligations that will become due upon the happening of a future event that was 'within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created.'" *In re Chateaugay Corp.*, 944 F.2d 997, 1004 (2d Cir.1991) (discussing meaning of the term in context of the new Bankruptcy

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[3] Even the statutory definition of the term "claims" offers no real assistance due to its highly general nature. Section 77 provides that "[t]he term claims includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character."

Code). For the purposes of this case, the "original relationship between the parties" was created when Union Pacific bought the railyard from CMC's predecessor. Therefore, the question is presumably whether, at the time of the purchase, an obligation to clean up the contamination at the railyard would arise on the happening of some future event that was within the actual or presumed contemplation of the parties. The difficulty in attempting to answer this question is that the statute upon which Union Pacific bases its indemnification claim was not in effect until *after* the bar dates.

As the Seventh Circuit has noted, "the determination of when a party has a claim or contingent claim seems to hinge on the nature of the claim and the posture of the case." *Chicago I*, 974 F.2d at 781. This observation is especially appropriate in this case, given that Union Pacific's claim is based on a statute enacted after the bar dates and that the Seventh Circuit has given a general indication of how to proceed on remand. Therefore, it is appropriate to review certain facts of this case as well as the procedural history leading up to CMC's renewed motion.

Union Pacific purchased the railyard from the Milwaukee Road in 1980. Included in the purchase agreement was the indemnity clause under which Union Pacific now seeks to collect contribution from CMC for remediation costs at the railyard. In 1985, this court entered orders barring all claims against the Milwaukee Road and its successor and assigns, including CMC, that had not been timely filed. In 1989, the State of Washington's Model Toxics Control Act, Wash. Rev.Code ch. 70.105D ("the Model Act"), took effect. Union Pacific decided to sell the railyard and commissioned an audit. The audit was completed in June 1990, and revealed that the railyard was contaminated with hazardous substances. Union Pacific duly notified the State of Washington of those findings. In October 1990, the Washington Department of Ecology ("DOE") notified Union Pacific that it was potentially liable under the Model Act. In July 1991, Union Pacific agreed to clean up the contamina-

tion at the railyard. Union Pacific then filed suit in the Western District of Washington seeking contribution from CMC for clean-up costs pursuant to the indemnity provision in the purchase agreement for the railyard.

CMC filed a motion with this court (which had retained jurisdiction to enforce the discharge order) to enjoin Union Pacific from prosecuting its claims under both CERCLA and the Model Act. This court enjoined Union Pacific from seeking contribution for any claims arising out of CERCLA, but declined to enjoin Union Pacific from seeking contribution for any claims arising out of the Model Act. On appeal, the Seventh Circuit affirmed this court's ruling with respect to CERCLA, but it vacated and remanded this court's ruling with respect to the Model Act. With respect to the latter, the court of appeals stated:

> We now turn to CMC's appeal challenging the district court's determination that Union Pacific's claim under [the Model Act] was not barred because the Model Act did not go into effect until after the 1985 bar dates. CMC acknowledges that the Model Act went into effect after the bar dates and that several courts have held that claims based on a statute enacted after the discharge in bankruptcy are not barred. *E.g., Penn Central,* 944 F.2d at 168. CMC distinguishes these cases by asserting, "Union Pacific was aware of existing liabilities to the United States and the State of Washington for clean-up of the Railyard Site, under both CERCLA and existing Washington State statutes." CMC Br. at 24. CMC relies on the state Water Pollution Control Act, Wash.Rev. Code ch. 98.48, and on the Hazardous Waste Management Act, Wash. Rev.Code ch. 70.105, with its accompanying regulations, Wash. Admin.Code ch. 173-303. These enactments were in effect prior to the

> adoption of the Model Act. Union Pacific vigorously argues that it had no liability under the laws existing in 1985 and that the Model Act imposed an entirely new species of liability.
>
> We will not meet the question at this time as to what liabilities under the Model Act existed in 1985 by virtue of Washington state statutes then in effect. The district court did not make findings in this respect, and we will remand these proceedings to that court to make this determination in the first instance.
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> It is suggested that upon remand the parties assist the court by preparing a section-by-section comparison of the Model Act with previously enacted relevant state statutes. Such an analysis could indicate whether a particular type of liability under the Model Act existed under predecessor statutes prior to the bar dates, and whether Union Pacific consequently had a contingent claim for environmental cleanup costs under Washington statutes in effect before the bar dates. *Chicago III*, 3 F.3d at 207-08.

On remand, the magistrate judge compared Union Pacific's liability under the Model Act with its liability under three arguably relevant Washington statutes in effect in 1985: The Water Pollution Control Act ("Water Act"), Wash. Rev.Code ch. 90.48; the Hazardous Waste Management Act ("Hazardous Waste Act"), Wash.Rev.Code ch. 70.105; and the state nuisance statute, Wash.Rev.Code ch. 7.48 (hereinafter referred to collectively as "the prior existing statutes"). The magistrate judge found that liability under the Model Act is premised on the mere ownership of a contaminated site. In other words, the owner of the site need not be responsible for the contamination; mere ownership is

sufficient to create liability under the Model Act. R & R at 6. The magistrate judge then compared this strict liability scheme with the liability schemes of the prior existing statutes. The magistrate judge concluded that no similar type of strict liability could be imposed under either the Water Act or the Hazardous Waste Act. As for the state's nuisance statute, the magistrate judge concluded that, even if Union Pacific could be held liable for merely failing to remedy the existing contamination at the railyard, its liability would still be far less certain than under the Model Act; moreover, any damages for which Union Pacific might have been held responsible would have been much less.

In light of the Seventh Circuit's directions on how to proceed on remand, this court concludes that the magistrate judge employed the correct methodology in this case for determining whether, prior to the bar dates, Union Pacific had a "claim" for indemnification for the purposes of section 77. The Seventh Circuit refused to address, and instead directed this court to address, the question of "what liabilities under the Model Act existed in 1985 by virtue of Washington state statutes then in effect." *Chicago III*, 3 F.3d at 208. The court also suggested that a section-by-section comparison of the Model Act with the prior existing statutes

> could indicate whether a particular type of liability under the Model Act existed under predecessor statutes prior to the bar dates, and whether Union Pacific consequently had a contingent claim for environmental cleanup costs under Washington statutes in effect before the bar dates.

Id. In this court's view, the most straightforward reading of these quoted passages indicates that the Seventh Circuit directed this court to ascertain whether Union Pacific faced the same type of liability under the Model Act as Union

Pacific faced under the prior existing statutes.[4] This is exactly what the magistrate judge did. In doing so, he considered the basis of the potential liability under the various statutes, the relative likelihood of liability under them, as well as the possible damages faced under them. The court concludes that the magistrate judge correctly followed the mandate of the court of appeals. CMC's objection to the R & R based on the appropriate section 77 standard is overruled.

III.

CMC's third objection is that, in comparing the Model Act with other Washington statutes, the magistrate judge misinterpreted those other statutes. As discussed above, the magistrate judge compared Union Pacific's liability under the Model Act with its potential liability under the prior existing statutes, namely, the Water Act, the Hazardous Waste Act, and the state nuisance statute. The magistrate judge began by ascertaining the basis of liability under the Model Act. The magistrate judge correctly noted that liability under the Model Act can be premised on the mere ownership of a contaminated site. See Wash.Rev.Code § 70.105D.040. What CMC objects to are the magistrate judge's conclusions regarding the nature of liability under the prior existing statutes. The court will address CMC's objections to the magistrate judge's conclusions regarding each of these statutes in turn.

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[4] This interpretation is supported by the Seventh Circuit's description of CMC's arguments on appeal: CMC argues that the district court erred in determining that Union Pacific could not have known of its state law liabilities until after the consummation order was filed; *it asserts that the Model Act did not create new duties but merely recodified existing duties under the [Water Act, the Hazardous Waste Act], and accompanying regulations*. *Id.* at 206 (emphasis added). CMC's argument to the court of appeals implied that, on remand, the task was simply to determine whether the liabilities arising under the Model Act were the same as those arising under the prior existing statutes.

A. The Water Act

The prohibitory section of the Water Act provides:

> It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the commission, as provided for in this chapter.

Wash.Rev.Code § 90.48.080. The magistrate judge rejected CMC's argument that this section imposed liability against Union Pacific similar to that imposed under the Model Act. R & R at 8-11. An examination of the plain language of the Model Act and the Water Act corroborates the magistrate judge's conclusion.

The Model Act sets forth a list of persons who "are liable with respect to a [contaminated] facility." Wash. Rev.Code § 70.105D.040(1). Among those persons listed is the "owner or operator of the facility." *Id.* In contrast, before liability attaches under the Water Act, the party must have, at a minimum, "allowed to seep or otherwise discharged into [any of the waters of the state] any organic or inorganic matter that shall cause or tend to cause pollution of such waters." Wash. Rev.Code § 90.48.080. In short, the Model Act targets those who own contaminated sites (regardless of whether those sites are the source of pollution to state waters), whereas the Water Act targets only those who allow contamination from a site to pollute the waters of the state.

CMC contends that the magistrate judge erred because Washington case law supports the view that the Water Act imposes strict liability on landowners for failing to prevent pollution to state waters, regardless of source. The court finds CMC's argument unpersuasive for several reasons.

First, CMC concedes that liability under the Water Act attaches only in cases of pollution to state waters. It is clear that liability under the Model Act is not limited in this way. Second, the cases relied on by CMC all involve an affirmative act on the part of the landowner (or his agent) that caused the pollution to state waters. See *Sea Farms, Inc. v. Foster & Marshall Realty*, 42 Wash.App. 308, 711 P.2d 1049 (1985) (defendants' dredging for construction of marina alleged to have caused silt to deposit on and damage plaintiff's oyster beds), *review denied*, 105 Wash.2d 1010 (1986); *Clark v. United States*, 660 F.Supp. 1164 (W.D. Wash.1987) (defendant's disposal of waste materials in landfills and burn pits alleged to have resulted in contamination of plaintiffs' water supply); *Nordevin, Inc. v. State of Washington, Department of Ecology*, 1992 WL 172977 (Washington Pollution Control Board) (defendant's improper regrading alleged to have caused significant sediment-laden run-off in adjacent waterway).[5]

CMC also objects to another aspect of the magistrate judge's decision concerning the Water Act. According to CMC, the magistrate judge erred in inferring that the DOE lacked authority to institute remediation proceedings against Union Pacific under the prior existing statutes based on the fact that the DOE delayed instituting such proceedings until after the passage of the Model Act. As CMC points out, the EPA delayed instituting remediation proceedings at the railyard under CERCLA even though the EPA had similar information as the DOE about contamination there. This delay, however, does not lead to the conclusion that the EPA lacked authority to order a clean-up. See Objections at 13.

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[5] CMC also relies on *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 6 F.3d 1184, 1192 (7th Cir.1993) ("*Chicago IV*"). A thorough review of that case reveals that it does not even discuss the Water Act or any other Washington environmental statute. The court assumes that CMC's citation to *Chicago IV* was the result of carelessness rather than a deliberate attempt to mislead.

CMC has a valid argument on this point, but it avails CMC little. For as Union Pacific notes, the magistrate judge's conclusion regarding the inference to be drawn from DOE's delay in instituting clean-up proceedings was simply a response to CMC's argument in support of its renewed motion. CMC had argued that because DOE exercised extensive regulatory jurisdiction over environmental conditions in the area, it necessarily had authority to order a clean-up or to assert a cognizable claim for damages. However, the mere fact that DOE spent considerable time identifying and assessing the pollution in the Commencement Bay area does not necessarily mean that the prior existing statutes authorized DOE to order a clean-up. Although the court does not agree with the inference drawn by the magistrate judge from DOE's delay, the court does not believe that that one faulty aspect of the magistrate judge's reasoning undermines the magistrate judge's ultimate conclusion that the liability under the Water Act was not the same as that under the Model Act.

CMC's objection to the magistrate judge's conclusion with respect to the Water Act is overruled.

B. The Hazardous Waste Act

The Hazardous Waste Act includes the following prohibitory provision:

> No person shall dispose of designated extremely hazardous wastes at any disposal site in the state other than the disposal site established and approved for such purpose under provisions of this chapter.

Wash.Rev.Code § 70.105.050. The magistrate judge noted that the Hazardous Waste Act makes liable any party who violates this provision and thereby injures another. Wash.Rev.Code § 70.105.097. The Hazardous Waste Act defines "dispose or disposal" as "the discarding or abandoning of hazardous wastes or the treatment, decontamination, or recycling of such wastes once they have

been abandoned." Wash.Rev.Code § 70.105.010(4). Given these provisions, the magistrate judge concluded that DOE certainly "had the authority to clean the site up and assert a valid cause of action against the party responsible for the disposal of oil at the railyard." R & R at 12-13. The magistrate judge proceeded to observe that "[i]t is far less clear . . . whether [DOE] could have asserted a cause of action against Union Pacific" because "[b]oth the text of the Hazardous Waste Act and the regulations promulgated thereunder refer to liability and responsibility only with regard to the party *responsible for the violation.*" *Id.* at 13. As support, the magistrate judge cites the regulations implementing the Hazardous Waste Act. They provide in relevant part that the DOE "may require the person responsible for the spill or discharge to . . . [c]lean up all released dangerous wastes or hazardous substances." Wash. Admin.Code § 173-303-145(3)(a)(i).

CMC argues that the magistrate judge ignored the definition of "discharge," which the applicable regulations define as "the accidental or intentional release of hazardous substances . . . such that [they] may enter or be permitted to enter into the environment." Wash.Admin.Code § 173- 303-040(24). "Release" is defined so as to "include[] . . . the actions of: Spilling, leaking, pumping, pouring, emitting, dumping, emptying, depositing, placing, or injecting." *Id.* CMC implies that Union Pacific somehow "leaked" the hazardous substances at the railyard and therefore was liable for clean-up, presumably under Wash.Admin.Code § 173-303-145(3)(a)(i). Objections at 14-15.

CMC cites no evidence to support the proposition that Union Pacific "leaked" hazardous substances at the railyard. Indeed, this court previously found that, after the purchase, "Union Pacific's only action with regard to the railyard was to remove existing structures and clean up the surface of the yard." Memorandum and Order of October 21, 1992, at 4. Absent evidence that Union Pacific leaked or otherwise released any of the contaminants, Union Pacific was not a

party responsible for the discharge of the contaminants. Union Pacific could not be held liable under the Hazardous Waste Act for clean-up costs merely by virtue of its ownership of the railyard. Hence, Union Pacific did not face the same liability under the Model Act as it faced under the Hazardous Waste Act. The magistrate judge did not err in so finding.[6]

CMC's objection to the magistrate judge's conclusion with respect to Hazardous Waste Act is overruled.

C. Washington State Nuisance Statute

Under Washington law, it is a public nuisance [t]o throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, stream, lake, pond, spring, well, or common sewer, street, or public highway, or in any manner to corrupt or render unwholesome or impure the water of any stream, pond, lake, or well, to the injury or prejudice of others.

Wash.Rev.Code § 7.48.140(2). The magistrate judge noted that, "[b]ased on the above definition, it could reasonably be argued that Union Pacific's failure to remedy the existing contamination on the site constituted an actionable public nuisance." R & R at 14-15. Nevertheless, the magistrate judge concluded that two fundamental differences existed between the nuisance statute and the Model Act: (1) the relative uncertainty of liability under the nuisance statute as compared to the Model Act, and (2) the lesser likelihood that liability under the nuisance statute would result in clean-up costs, given that the area around the railyard is extensively polluted. R & R at 15-16.

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[6] CMC also argues that the magistrate judge "wrongly ignored the definition of persons 'having control over oil' as to who [DOE] could take enforcement action." Objections at 15. As Union Pacific points out, CMC cites no authority for its proposed definition. Nor does CMC indicate how this definition fits into the statutory or regulatory scheme of the Hazardous Waste Act. Therefore, the court finds that this argument is waived.

CMC argues that, under Washington law, the "[v]iolation of pollution laws, including specifically the violation of the Water Act, is a nuisance." Objections at 16-17. CMC cites *Miotke v. City of Spokane*, 101 Wash.2d 307, 678 P.2d 803 (Wash.1984) as support. *Miotke* does not stand for the proposition that a violation of the Water Act is a public nuisance per se. Rather, the court in Miotke analyzed the nuisance laws and concluded that the pollution in that particular case (which was caused by an act that violated the Water Act permit scheme) met the definition of a public nuisance. *Miotke*, 101 Wash. at 330-31, 678 P.2d at 816-17.

CMC maintains that the magistrate judge erred in concluding that liability under the nuisance laws "is far less certain than it is under the Model Act, which provides for strict liability on the basis of ownership." R & R at 15-16. CMC notes that under Washington law, "[e]very successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property caused by a former owner, is liable therefor in the same manner as the one who first created it." Wash.Rev.Code § 7.48.170. Nevertheless, this fails to address the magistrate judge's point, which was that to establish a nuisance, a party must demonstrate that the defendant committed a wrongful act or omission and that the party suffered tangible harm in its ability to enjoy its property. In contrast, liability under the Model Act is relatively certain, based as it is on mere ownership of a contaminated site. R & R at 15-16.

Finally, CMC takes issue with the magistrate judge's distinction between the Model Act and the nuisance statute regarding the calculation of damages. The magistrate observed that nuisance damages are limited to personal injuries and property damage flowing from the nuisance. The magistrate then reasoned that because

> the railyard is located in a section of Tacoma characterized by heavy industry and which is extensively contaminated[,] it seems unlikely

> that the polluted nature of the railyard makes it any more bothersome to adjoining landowners than it would be in a pristine condition. Therefore, even if a successful nuisance claim could have been brought against Union Pacific for the pollution [of] the yard, the resultant damages would have been far less substantial than those faced by Union Pacific under the Model Act, and would likely have not involved clean-up damages.

R & R at 16. As CMC notes, however, a damages remedy is not the only remedy available for a nuisance. Abatement is a possible remedy under Washington State law. See Wash. Rev. Code § 7.48.180, -.200, -.230, -.260. If Union Pacific were liable under the nuisance statute, it could bear the cost of abating the nuisance, *i.e.*, cleaning up the contamination. Therefore, the court does not agree that the distinction based on the calculation of damages is relevant to the comparison of the Model Act and the nuisance statute.

Nevertheless, as noted above, nuisance liability is far less certain than liability under the Model Act. In addition, the nature of the liability differs between the Model Act and the nuisance statute: Liability under the Model Act is premised on mere ownership of a contaminated facility, whereas liability under the nuisance statute is based on "corrupt[ing] or render[ing] unwholesome or impure the water of any . . . spring, stream, pond, lake, or well, to the injury or prejudice of others." Wash.Rev.Code § 7.48.140(2). Although a contaminated site can be the source of such corruption, it need not be. For these reasons, the court concludes that Union Pacific's potential liability under the Model Act was of an entirely different nature than its potential liability under state nuisance law.

CMC's objections to the magistrate judge's conclusions with regard to the state nuisance statute are overruled,

except to the extent the magistrate judge relies on the distinction based on the calculation of damages.

ORDERED: Except as specifically noted in the body of this Memorandum Opinion and Order, CMC's objections to the Report and Recommendation are overruled, and the court adopts the Report and Recommendation of the magistrate judge. CMC's renewed motion to enjoin Union Pacific's state law claims for remediation is denied.

George W. Lindberg
District Judge

Date: December 28, 1994

APPENIDX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF	) In Proceedings for the
	) Reorganization of a Railroad
CHICAGO, MILWAUKEE,	)
ST. PAUL and PACIFIC	)
RAILROAD COMPANY	)
	) No. 77 B 8999
Debtor.	) Prentice H. Marshall, Judge

ORDER NO. 866

FINAL DECREE

Upon consideration of the Trustee's Motion for Entry of a Final Decree, filed pursuant to the Trustee's Modified 1985 Plan of Reorganization (the "Plan"), due notice having been given to creditors, stockholders and other parties in interest, the Court, acting as a Court of Reorganization for the Debtor pursuant to Section 77 of the Bankruptcy Act of 1898, as amended ("Section 77"), finds and concludes as follows:

1. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Debtor in this proceeding, a Wisconsin corporation, filed on December 19, 1977 its petition to this Court to effect a plan of reorganization under Section 77. A copy of that petition was filed at the same time with the Interstate Commerce Commission (the "Commission"). This Court has jurisdiction over the proceedings pursuant to Section 77.

2. The Court approved the petition as properly filed on December 20, 1977. Stanley E.G. Hillman was appointed trustee of the property of the Debtor on February 13,

1978. Mr. Hillman was succeeded as Trustee by Richard B. Ogilvie on August 29, 1979. Mr. Hillman from the date of his appointment until August 20, 1979, and Mr. Ogilvie from that date until the present time, have continued in the possession and control of the property and assets of the Debtor and their operation.

3. On March 31, 1983, the Trustee filed with the Court an Amended Plan of Reorganization for the Debtor, which was referred to the Commission by order of this Court. After due notice and hearings, the Commission, in orders served September 26, 1984, and January 11, 1985, approved a modified version of the Trustee's plan.

4. On February 19, 1985, this Court, in Order No. 809, approved the sale of the Debtor's operating rail assets to the Soo Line Railroad Company and its affiliate The Milwaukee Road, Inc., formerly SLRCO, Inc. (collectively "Soo") pursuant to the terms of an Asset Purchase Agreement ("APA") between the Trustee and Soo.

5. On April 10, 1985, the Commission, upon petition of the Trustee, issued a decision in which it ruled that further modifications to the Trustee's Amended Plan need not be considered by the Commission.

6. On May 1, 1985, the Trustee filed with this Court his 1985 Plan of Reorganization for the Debtor (the "Plan"). The Plan recognized the sale of the operating assets to Soo but otherwise incorporated the essential provisions of the plan approved by the Commission. After due notice to creditors, stockholders and other parties in interest was given in accordance with Order No. 811, this Court held hearings, received evidence, and heard the arguments of counsel on June 24, 25 and 27, 1985 and on July 12, 1985 for the purpose of considering approval and confirmation of the Plan.

7. On July 12, 1985, this Court entered its Order No. 832 modifying the Plan in certain respects and confirming and approving the Plan as modified.

8. The Plan authorizes and directs the Trustee to proceed with the consummation of the Plan, but provides for the retention of jurisdiction by this Court with respect to the consummation of the Plan, including the entry of a final decree pursuant to Section 77(f) discharging the Trustee and closing the case, except as provided below.

9. The Trustee has substantially completed the consummation of the Plan and it is now appropriate for this Court to enter a Final Decree with respect to certain matters involved in the consummation of the Plan and on the discharge of the Trustee.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The "Consummation Date" for purposes of the Plan shall be November 25, 1985.

2. The APA and the Plan require the amendment of the Debtor's articles of incorporation to change its corporate name. The form of amendment to the Debtor's articles of incorporation attached as Exhibit A is approved in all respects. The Trustee is authorized and directed to file that amendment with the appropriate officials in order to effect the change of the Debtor's name. The filing officer in the State of Wisconsin is directed to accept the amendment and to issue the appropriate certificate reflecting the change of the Debtor's name.

3. The following people, who have been recommended by the Trustee as provided in the Plan, are appointed to serve as directors of the Reorganized Company until the first meeting of shareholders of the Reorganized Company:

Jack Nash	Clarence G. Frame
Ezra H. Zilkha	Robert C. Reed
Peter Sharp	Edwin Jacobson
Leon Levy	Daniel R. Murray

Jerold S. Solovy

4. a. The Trustee has recommended and the Court approves the deposit at Consummation Date a total of $225,000,000 million (less the amount paid with respect to Allowable Claims prior to the Consummation Date) in the Segregated Account established by the Plan, and in the Appeal Escrow Account described in paragraph 4b below, with $129,200,898.58 in the Segregated Account and $95,799,101 42 in the Escrow Appeal Account. Five days before the approved Consummation Date the Trustee shall file with this Court and serve on the parties a report showing the amount of Allowable Claims paid prior to Consummation Date and the resulting amount required to be deposited in the Segregated Account. The Segregated Account, but not the Appeal Escrow Account provided for in paragraph 4b, shall be held pursuant to the form of Escrow Agreement attached as Exhibit B. The Escrow Agent shall be the Continental Illinois National Bank and Trust Company of Chicago or such other bank as may be designated from time to time by this Court. The Escrow Agent is instructed to pay money out of the Segregated Account only as provided in the Plan, this Order, or further orders of this Court, and to invest the Segregated Account as provided in paragraph 5.

The Reorganized Company is directed to pay Allowable Claims from the Segregated Account (or from other moneys if no money remains in the Segregated Account), as provided in Section 5.2 of the Plan, except for Class B Claims, which are provided for in paragraph 4b. The Reorganized Company is also directed to pay the reasonable fees of the Escrow Agent for its services with respect to the custody of the Segregated Account.

b. In addition to the Segregated Account provided for in paragraph 4a, there is also established, pursuant to Order 858A, the Appeal Escrow Account of $95,799,101.42 (established 10/16/85), as security for the Class B Claims until disposition of CMC's appeal and the Committee's cross-appeal

from Orders 831 and 832. The Appeal Escrow Account shall be held separate and apart from the Segregated Account and shall be subject only to the terms of Order 858A.

5. Amounts in the Segregated Account shall be invested in (i) direct obligations of the United States or obligations of agencies of the United States or obligations which are backed by the full faith and credit of the United States, (ii) certificates of deposit or similar debt obligations of banking institutions, such as bankers' acceptances or repurchase agreements, of commercial banks insured by the Federal Deposit Insurance Corporation, (iii) direct and general obligations of any state which are rated in either of the two highest full rating categories by at least one nationally recognized rating agency, (iv) commercial paper rated not lower than P-1 or P-2 by Moody's Investors Service, Inc., or not lower than A-1 or A-2 by Standard and Poor's Corporation, or (v) money market funds with fixed principal values and which invest only in instruments with credit ratings equivalent to those specified above. Investments shall be made at the direction of the Reorganized Company. Investment earnings on amounts in the Segregated Account may be paid out to the Reorganized Company as realized.

6. On the Consummation Date all right, title and interest of the Trustee in the property of the Estate shall vest in and become the absolute property of the Reorganized Company, notwithstanding the laws of any state or the decision or order of any state authority to the contrary. Except as otherwise provided in this Order or in the Plan, the Reorganized Company shall take the property free and clear of all claims, rights, demands, interests, liens and encumbrances of every kind and character. The Trustee is authorized and directed to execute and deliver to the Reorganized Company a deed and bill of sale transferring all of the property of the Estate. The form of those instruments shall be determined by the Trustee. All property and funds of the Estate held by persons other than the Trustee shall be delivered or paid over to the Reorganized Company, except (i) the Segregated

Account and (ii) escrow accounts pertaining to Tax Benefit Transfer Leases which run in favor of the lessor.

7. Except as provided in this Order or in the Plan, the Debtor, the Trustee in his representative capacity and the Reorganized Company shall be, as of the Consummation Date, released forever from: (i) all obligations, debts, liabilities, claims and causes of action against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or the Trustee or enforceable against the property of the Debtor; (ii) all obligations, debts, liabilities and claims arising from costs and expenses of administration, whether or not filed or presented and whether or not approved, acknowledged or allowed in these proceedings, including without limitation all taxes, assessments, claims and other charges of governmental units or agencies, whenever assessed, accruing prior to the Consummation Date; and (iii) all obligations, debts, liabilities and claims with respect to all bonds, coupons, debentures, notes, certificates, evidences of indebtedness, shares of stock, securities and leases (including interest accrued and dividends declared), without limitation as to their nature and whether made, assumed or guaranteed by the Debtor or the Trustee or enforceable against any of them or the property of any of them.

8. Notwithstanding paragraph 7 above, the Reorganized Company shall be liable and responsible for the payment of Allowable Claims after the Consummation Date as provided in Section 5.2 of the Plan, for those Allowable Claims described in Section 5.6 of the Plan, for its obligations under contracts assumed by the Trustee pursuant to Section 6.1 of the Plan and for obligations of the Trustee arising during the administration of the Estate to the extent that the Trustee is bound by those obligations (including, without limitation, the Trustee's obligations under the APA and Order 809), provided, however, that the Reorganized Company shall not be liable and responsible for claims against the Trustee in his individual

capacity and, with respect to such claims, shall not indemnify the Trustee as provided hereinafter. The Reorganized Company shall indemnify the Trustee, his agents, attorneys and employees against any and all expenses (including attorney's fees), costs, fees, liabilities and fines arising out of the matters for which the Reorganized Company shall be liable as set forth in this Paragraph 8 or which pertain to or arise out of the administration of the Estate or the conduct of the reorganization proceedings, except where this Court determines that indemnification is inappropriate.

9. The Court reserves jurisdiction, which shall be exclusive to the extent that under applicable law the Court's jurisdiction is now exclusive:

(a) To consider and act with respect any Claim against the Debtor or the Trustee included in a class provided for under the Plan or with respect to any contingent claim (which shall not include claims against the Trustee in his individual capacity), asserted but not finally settled or adjudicated prior to the Consummation Date;

(b) To consider and act on any matter over which the Court now has jurisdiction and which has not been adjudicated, discharged or resolved prior to the Consummation Date (including questions and controversies arising under or with respect to the APA and Order 809);

(c) To consider and act on any application for instructions with respect to the Segregated Account, including the distribution of funds from, and any claim upon, the Segregated Account;

(d) To consider and act with respect to the allowance of fees to the Trustee, his staff and counsel, and other parties pursuant to Section 9.1 of the Plan; and

(e) To consider and act upon any other matter as to which the Plan reserves jurisdiction in this Court.

10. The Reorganized Company is authorized and directed to file or record, in each of the jurisdictions in which

it owns real property, a copy of this Order and the deed transferring the property of the Estate to the Reorganized Company. The recording officer in each such jurisdiction shall accept those documents for recording. No tax (including stamp, conveyance, transfer and similar taxes) or other fee shall be imposed with respect to the conveyance of the property of the Estate to the Reorganized Company, except for ordinary and customary fees for the recordation of documents.

11. The APA provides that if all inaccuracies in deeds and other instruments of conveyance from the Trustee to the Soo have not been corrected prior to the consummation of the Plan, the Plan will contain provisions for continued correction of the deeds and other instruments of conveyance. Pursuant to the agreement of the parties to the APA, this Order, rather than the Plan, sets forth provisions for the continued correction of deeds and other instruments of conveyance. The APA also provides for certain adjustments to the purchase price for the Railroad. Soo has claimed that it is entitled to such an adjustment.

The Trustee and the Soo are authorized and directed to continue to negotiate in good faith, prior to the Consummation Date, the settlement of disputes relating to the correction of deeds and other instruments of conveyance and the adjustment of the purchase price under the APA. If, by the Consummation Date, the Trustee and the Soo have not resolved those disputes, the Reorganized Company and the Soo shall, for 90 days following the Consummation Date, negotiate in good faith to settle the disputes. During the 90 day period, neither the Reorganized Company nor the Soo shall sell, mortgage or encumber real property which immediately prior to the closing of the APA on February 19, 1985 was owned or operated by the Trustee and located within those states in which the Trustee conducted rail operations, without giving prior written notice to the other more than 15 days prior to the proposed action. In the event of disagreement over a proposed action, either party may apply to this Court for appropriate relief. If no settlement of these matters has been completed by the end of that 90 day

period, this Court shall hear and resolve the remaining disputes, and retains jurisdiction for that purpose.

12. Except as provided in this Order or the Plan, as of the Consummation Date, the Trustee shall be discharged and shall be relieved of any further duties and responsibilities in respect of the administration of the property or the conduct of the business of the Debtor. The Trustee is forever discharged and released from any liability for any claim in his representative capacity which is barred pursuant to the Plan. His bond shall be released when all claims against him in his individual capacity are finally resolved and satisfied.

13. All persons, firms, corporations and other entities, including without limitation the United States and state and local governmental bodies and agencies ("Entities"), are by this Order perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute, or pursue, any suit, action or proceeding ("Action") against the Reorganized Company (or its successors and assigns), or against any of the assets or property of the Reorganized Company (or of its successors and assigns), directly or indirectly, by reason of or on account of any obligation or obligations incurred by the Debtor or by the Trustee, except the obligations imposed upon or required to be assumed by the Reorganized Company by the Plan (including those claims filed pursuant to Section 11.1 of the Plan which are ultimately determined to be Allowable Claims) or this Order. The Actions restrained and enjoined by this Order include, without limitation, those based upon or on account of any right, claim, judgment or interest of any kind or nature in, to, or against the Debtor or any of its assets or properties, or which interfere with, attach, garnish, levy upon, enforce liens against or upon, or in any manner disturb any portion of the property (real or personal) now or in the future belonging to or being in the possession of the Reorganized Company (or its successors and assigns), or which interfere with or take steps to interfere with the Reorganized Company, its officers, agents and employees, or the conduct of its business.

All Entities are also by this Order restrained and enjoined from prosecuting against the Trustee in his representative capacity or against the Reorganized Company any Action arising out of or based on any act done or omitted to be done in consummating and carrying out the Plan or any order of this Court entered in these proceedings. Notwithstanding any of the foregoing, nothing in this Order shall preclude the further prosecution of any appeal previously noticed and pending as of this date.

14. Except as provided in this Order, all jurisdiction of this Court in or by reason of these proceedings shall be terminated and these proceedings shall be closed effective as of the Consummation Date.

Dated: November 12, 1985

ENTER:

/s/ Prentice H. Marshall
District Judge